88-1070

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an occupational health standard designed by OSHA for one particular industrial sector (in this case, manufacturing) can properly be extended to cover other industrial sectors (here, including construction) in the absence of industry-specific showings that a significant risk of material harm exists and that the standard is feasible and reasonably necessary as to each industry to which it is made applicable.

(a) Did the Third Circuit err in holding, contrary to the District of Columbia, Fourth and Fifth Circuits, that proof of "significant risk" under section 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, does not require industry-specific showings, but may be satisfied by "a general finding concerning all potentially affected industries"?

(b) Did the Third Circuit err in holding, contrary to the District of Columbia and Fourth Circuits and to OSHA's own interpretation of the Act, that section 6(b)(5) does not impose a burden on the Secretary to show the *feasibility* of a challenged standard, but rather may be satisfied by a mere absence of evidence that the standard would be *infeasible*?

(c) Did the Third Circuit err in refusing to consider whether the standard was reasonably necessary or appropriate as applied to construction, despite this Court's suggestion in *American Textile Manufacturers, Inc. v. Donovan*, 452 U.S. 490, 514 n.32 (1981) (*"ATMI"*), that the " 'reasonably necessary or appropriate' language" of section 3(8) of the Act "might . . . impose additional restraints on OSHA" beyond those contained in section 6(b)(5)?

2. Whether the Third Circuit improperly usurped OSHA's discretion to establish its own priorities and

procedures and implement its own permissible interpretation of its statutory mandate when the court ordered OSHA either to extend to all industries a standard OSHA had developed solely for the manufacturing sector, or to explain why it would be infeasible to do so, and further when the court compelled OSHA to make this determination without conducting additional evidentiary proceedings which OSHA had concluded were a necessary prerequisite to any extension of the standard.

3. Whether, any time an OSHA standard or other federal agency regulation is challenged in court as underinclusive because it excludes persons who might potentially have been regulated, all those persons who have been excluded from the regulation's coverage must then seek to intervene in the review proceedings, even though they are not presently aggrieved, lest they be "foreclosed" from obtaining full judicial review thereafter if the regulation is eventually extended to cover them.

LIST OF PARTIES

The parties to the consolidated proceedings below were Petitioners, The Associated General Contractors of America (AGC)* and The Associated General Contractors of Virginia, and Respondent Occupational Safety and Health Administration, U.S. Department of Labor. United Technologies Corporation and The National Grain and Feed Association, Inc. intervened in support of Petitioners. United Steelworkers of America, AFL-CIO, and the Building and Construction Trades Department, AFL-CIO intervened in support of Respondent.

In addition, Associated Builders and Contractors, Inc., The National Grain & Feed Association, Inc., and United Technologies Corporation were petitioners in the consolidated companion cases below. The "Construction Industry Trade Associations," ** and the National Paint and Coatings Association intervened in support of Petitioners. Public Citizen, Inc. and the Connecticut Council on Occupational Safety and Health intervened in support of Respondent.

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* The Associated General Contractors of America is an association of construction contractors, including general contractors. AGC has 32,000 members, including 8,400 general contractors, and includes within its membership the members of Petitioner The Associated General Contractors of Virginia.

** The "Construction Industry Trade Associations" is an organization consisting of the National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association.

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Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, The Associated General Contractors of America and The Associated General Contractors of Virginia (AGC), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on November 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet App. 1a) is not officially reported. The court's unofficially reported opinion is *Associated Builders and Contractors, Inc. v. OSHA*, 13 BNA OSHC 1945 (3d Cir. 1988). In order to ascertain the grounds of the judgment below, it is also necessary to refer to two prior decisions of the court of appeals which resulted in issu-

ance of the subject OSHA standard. *See* Sup. Ct. R. 21 (k) (ii).[1]

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 655(f), petitioners and others requested judicial review by the Third Circuit of an occupational safety and health standard promulgated by the Occupational Safety and Health Administration. The court below entered a judgment and an opinion denying the Petition for Review on November 25, 1988. No. petition for rehearing was filed.

The judgment of the court of appeals was entered on November 25, 1988.[2] On December 3, 1988, AGC and other parties below filed a timely motion to stay the issuance of the mandate. On December 15, 1988, having received no ruling from the Third Circuit with the mandate due to issue on December 16, AGC and other parties submitted an emergency application for stay of the mandate. As of this filing, that application was pending.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Statutes

Section 3(8) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(8) provides:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

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[1] *United Steelworkers of America, AFL-CIO v. Auchter*, 763 F.2d 728 (3d Cir. 1985) ("*USWA I*"), Pet. App. 22a; *United Steelworkers of America, AFL-CIO v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) ("*USWA II*"), Pet. App. 54a.

[2] Pet. App. 21a.

Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5) provides:

> The Secretary, in promulgating standards dealing with toxic material or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Section 6(f) of the Act, 29 U.S.C. § 655(f), provides:

> Judicial review
>
> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

Section 6(g) of the Act, 29 U.S.C. 655(g), provides:

> Priority for establishment of standards
>
> In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

Regulations

Occupational Safety and Health Administration, Hazard Communication; Final Rule, 29 C.F.R. § 1926.59.[3]

Occupational Safety and Health Administration, Safety and Health Regulations for Construction, 29 C.F.R. § 1926.21(b)(1979), titled "Safety Training and Education, Employer Responsibility."[4]

STATEMENT OF THE CASE

A. The Development of a Hazard Communication Standard Applicable to the Manufacturing Sector

On January 16, 1981, OSHA's outgoing administration proposed a hazard communication standard. The preamble to the proposal stated that "[t]he proposed standard [was] designed primarily to provide hazards-related information to employees of employers engaged in manufacturing."[5]

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[3] A copy of the Final Rule has been lodged with the Clerk of this Court.

[4] Pet. App. 74a.

[5] 46 Fed. Reg. 4412, 4426 (January 16, 1981).

OSHA's new administration later withdrew the proposal.[6] In 1982, however, the new administration proposed a new hazard communication standard specifically for "all [manufacturing] employers in SIC Codes 20 through 39 (Division D, Standard Industrial Classification Manual)".[7]

When finally issued in 1983,[8] the standard required manufacturers, importers and distributors of hazardous chemicals to perform evaluations of those hazards;[9] to draft a detailed, technical document, called a material safety data sheet (MSDS), which summarizes the hazards and appropriate precautionary measures for each chemical; to place warning labels on all shipped containers; and to include an MSDS with the first shipment of a hazardous chemical to a customer.

The limited number of covered employers were also required to draft detailed hazard communication programs for their own employees; to train their employees on the hazards of the substances to which the employees were potentially exposed in their work; to make MSDSs available to their employees for all substances in the workplace defined as hazardous; and, to train their employees to understand MSDSs.

The preamble to the manufacturing standard proposal extended the following invitation for comments on its scope: "Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record

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[6] 46 Fed. Reg. 12214 (February 13, 1981).

[7] 47 Fed. Reg. 12119 (March 19, 1982).

[8] 48 Fed. Reg. 53280 (November 25, 1983).

[9] As the court below noted, the range of substances defined as hazardous under the standard is extremely broad; it covers literally "thousands of chemical substances used in numerous industries." Pet. App. 13a.

warrants it." 47 Fed. Reg. 12102 (March 19, 1982). As to the construction industry, however, OSHA stated:

> OSHA did consider whether to expand the scope of [the proposal's] coverage to construction and other non-manufacturing industries. Application of a hazard communication standard to construction is still under review in view of the unique features of that industry. Other nonmanufacturing industries would appear to have fewer chemical hazards and would receive substantial downstream information benefits from the required labels on containers and MSDSs [material safety data sheets] on first shipments.

47 Fed. Reg. 12111.

The invitation for comments also stated:

> Although non-manufacturing employers are not covered by the proposal, * * * [o]nce finalized and implemented, its effectiveness in triggering downstream transmittal could be assessed, and determinations made as to the type of hazard communication standard that may be effective and beneficial for other industries, such as construction or agriculture. If necessary, the proposal could be extended or modified for these other industries at a later date.

47 Fed. Reg. 12101-02.

Consistent with the proposal, the final standard applied only to manufacturing employers in SIC Codes 20-39. The preamble to the final rule contained no analysis of how the standard would apply to construction or other non-manufacturing industries. 48 Fed. Reg. 53280 (November 25, 1983).[10]

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[10] Under OSHA regulations, 29 C.F.R. §§ 1910.10, 1911.11(b), pre-publication submission of a proposed standard to the OSHA Construction Advisory Committee is a condition precedent to lawful promulgation of an OSHA standard governing construction employers. *National Constructors Ass'n v. Marshal,* 581 F.2d 960, 970 (D.C. Cir. 1978). At the public hearing on the manufacturing

B. The Extension of the Manufacturing Standard to Construction

1. *The Third Circuit's Decision in* USWA I

The United Steelworkers of America, AFL-CIO (USWA) and others sought judicial review of OSHA's decision to regulate only manufacturing employers in SIC Codes 20-39 under the final rule. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*"USWA I"*), Pet. App. 22a. Relying on section 6(g) of the Act, OSHA asserted that it had unreviewable discretion to set its rulemaking priorities; the agency also argued that it had articulated a cogent rationale for its choice. In short, OSHA said that it would study the experience with the hazard communication standard developed for the manufacturing industries which the agency had judged to have the greatest need for information disclosure, and then determine whether the same disclosure system would be necessary and effective in other industries such as construction. *USWA I*, Pet. App. 39a-41a. Significantly, the agency also argued that it had reviewed the Bureau of Labor Statistics (BLS) data on worker injuries in non-manufacturing, and had found that "record insufficient to establish the need to extend a standard designed for the manufacturing sector to additional industrial sectors, much less all employers," because the "data were not specific to chemical exposures." [11]

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proposal, the Director of OSHA health standards was asked if OSHA intended to submit the proposed standard to that committee. The OSHA official replied, "We don't have any present intentions of doing so. If we were to extend the scope of this to construction, as you know very well, we'd be required by law to do that." *Informal Public Hearing on Hazard Communication before the Occupational safety and Health Administration*, transcript p. 93 (June 15, 1982) (testimony of R. Leonard Vance).

[11] Brief for Secretary of Labor, *USWA I*, pp. 37-38. In this connection, it is important to note that construction workers were not unprotected; under an existing OSHA standard, 29 C.F.R. § 1926.21

The Third Circuit held that while Section 6(g) of the Act grants OSHA discretion "to set priorities for the use of the agency's resources, and to promulgate standards sequentially," once the agency promulgates a standard, it may exclude a particular industry from the standard only if it shows not only that the industries covered present greater hazards, but also "why it is not feasible for the same standard to be applied in other sectors, where workers are exposed to similar hazards." Pet. App. 40a. Since OSHA failed to show why non-manufacturing coverage would have "seriously impeded the rulemaking process," *id.*, the court allowed the standard to go into effect for manufacturing, but remanded the standard to OSHA, and ordered the agency to extend the standard to other sectors unless it could "state reasons why such application would not be feasible." *USWA I*, Pet. App. 42a.

2. *OSHA Conducts an Advance Notice of Proposed Rulemaking*

In response to the court's order, OSHA published an Advance Notice of Proposed Rulemaking (ANPR).[12] This was not a formal rulemaking;[13] rather, it was an informal notice which OSHA used to address several questions to the public on how the standard might work if applied to other industries. The agency conceded it lacked information on this issue. Referring to industries outside the manufacturing sector, OSHA specifically

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(b), Pet. App. 74a, construction employers were (and remain) required "to train the employees in hazard recognition related to their work." *Marshall v. M.W. Watson, Inc.*, 652 F.2d 977, 979 (10th Cir. 1981). The standard "requires more than a general safety program. . . It requires supervisory personnel to advise employees of the hazard associated with actual dangerous conduct in which they are presently engaging." *National Industrial Constructors, Inc. v. OSAHRC*, 583 F.2d 1048, 1055 (8th Cir. 1978).

[12] 50 Fed. Reg. 48794 (November 27, 1985).

[13] Section 6(b)(2) of the Act, 29 U.S.C. § 655(b)(2), requires publication of a proposed rule to commence rulemaking.

noted that "there is very little information concerning current practices of employers in those industries, or the applicability of the provisions as presently drawn when considering the diverse types of workplaces that may be encountered." [14]

3. *The Third Circuit's Decision in* USWA *II*

Dissatisfied with the pace of the the agency response to *USWA I*, the petitioners in that case moved to enforce its mandate. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*"USWA II"*), Pet. App. 54a. On review, defending its request for additional data, OSHA argued that "[t]he original rulemaking record did not provide a factual basis for a feasibility determination for sectors outside manufacturing." [15] The agency also contended that it was not permitted by the Act "to now 'skip' publication of a notice of proposed rulemaking and immediately promulgate a final rule." [16]

The Third Circuit granted the petitioners' motion. In so doing, the court held for the first time that the 1982 proposal had been adequate to notify all non-manufacturing interests that the final standard might apply to them. Nowhere did the court note that none of the non-manufacturing industries were then before the court. Pet. App. 60a. The court also explained that it intended OSHA to decide whether to extend the standard to non-manufacturing industries or to explain why that would be infeasible, based on the original rulemaking record which was before the court on review in *USWA I*.

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[14] 50 Fed. Reg. 48795.

[15] Secretary's Response to Petition's Motion For An Order Enforcing The Court's Judgment and Holding Respondent in Civil Contempt, *USWA II*, at 5. OSHA also noted that construction workers already received hazard information and training under its existing standard, 29 C.F.R. § 1926.21(b). *Id.* at 30 n.18. *See, supra*, n.11.

[16] *Id.* at 22.

The court's ultimate conclusion was that OSHA had unreasonably delayed rulemaking; therefore, under the Administrative Procedure Act, 5 U.S.C. § 706(1) (1982), the court ordered OSHA, within sixty days:

> to publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers.

Pet. App. 68a.

4. *OSHA Unsuccessfully Seeks Rehearing*

OSHA sought rehearing and rehearing *en banc*, arguing that regardless of whether its 1982 rulemaking notice could be construed to have notified non-manufacturers of their potential coverage, the agency lacked the evidence that would justify its extension of the manufacturing standard to all other industries.[17] The agency stated that "the fact that employers outside manufacturing did not respond to the Secretary's invitation to comment during the original HCS rulemaking does not mean that the Secretary's finding regarding feasibility for those employers need not be based on substantial evidence." Pet. Rehearing at 12. In explaining again why it had elected after *USWA I* to collect information about the non-manufacturing sector, OSHA stated:

> In the instant case, the Secretary concluded that in order to fulfill his statutory mandate, he needed further evidence concerning, among other things, the economic impact of the HCS on non-manufacturing

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[17] The Secreary's Petition for Rehearing and Suggestion for Rehearing *En Banc* has been lodged with the Clerk of this Court. It is hereinafter cited as "Pet. Rehearing".

> industries. Courts reviewing OSHA standards establishing exposure limits for toxic substances have ruled that the Secretary should establish feasibility *on an industry basis* and that a determination of economic feasibility requires a finding as to the estimated cost of the standard to the industry and its effect on the industry's long-term profitability (Citations omitted). The existing record contained *no* evidence of that nature with respect to non-manufacturing industries.

Pet. Rehearing at 8 (Emphasis in original in part, added in part).

Given this lack of information in the 1982 record as to the impact of the standard on non-manufacturing industries, OSHA argued that following the court's order would make its final standard legally vulnerable:

> Since the burden is on the Secretary to establish, based on substantial evidence, the feasibility of its standards (citation omitted), expansion of the HCS without additional fact gathering leaves the standard legally vulnerable under existing case law. . . . The panel erred in a fundamental way by ordering promulgation of a standard whose limited evidentiary underpinnings create substantial risk of invalidation in the event of subsequent attack. * * * The panel, moreover, has apparently shifted the burden of proof onto the proponents of nonfeasibility or at least has improperly lowered the burden the Secretary bears to establish the feasibility of a standard.

Pet. Rehearing at 10-11. The petition for rehearing and suggestion for rehearing *en banc* was denied.

5. *OSHA Issues a Revised Hazard Communication Standard Applicable to Construction and Other Non-Manufacturing Industries*

In accord with the Third Circuit's order, on August 24, 1987, OSHA—without collecting further evidence—issued a revised standard that applies to all industries, includ-

ing construction.[18] The preamble to the standard contrasted significantly with the agency's prior representations to the Third Circuit as to the agency's assessment of the 1982 rulemaking record. Thus, in the preamble, OSHA stated, for example, "OSHA concludes that the original HCS rulemaking record * * * does not contain credible evidence indicating the standard would be infeasible in any industrial sector. In fact, OSHA believes that the *original* record on the whole supports a finding that the performance-oriented HCS is feasible for all industries." [19] OSHA conceded, however, "that information submitted during a normal rulemaking process might have resulted in further changes to the provisions [of the standard] to better address feasibility or practicality concerns." [20]

The extended standard contains several new, previously unseen provisions that are applicable to the construction industry. Key among these is a requirement that each employer on a multi-employer worksite, *e.g.*, a construction project, either exchange with each other employer MSDSs on every chemical and physical hazard which the employer's employees may encounter on site normally or in "foreseeable emergencies," or maintain such MSDSs in a central location on each site. 52 Fed. Reg. 31880 (1987). As applied to the construction industry, the revised standard thus requires that each contractor on a multi-employer construction site anticipate not only the substances it may need to bring on site, but also what other contractors may need to bring, and the possibility that its employees may be exposed to what others bring. It also requires that the contractor sort through and cate-

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[18] 52 Fed. Reg. 31852 (August 24, 1987). The revised standard together with the preamble thereto have been lodged with the Clerk of this Court.

[19] 52 Fed. Reg. 31855 (emphasis added).

[20] 52 Fed. Reg. 31854.

gorize the hundreds of MSDSs it regularly receives from its suppliers and have a full set on each site where it is working.

The standard also requires construction employers to train all new hires on the standard, and in how to read MSDSs. Contractors must also train all new hires on all potential exposures to chemical and physical hazards and must provide additional training if another contractor introduces a new hazard. This may mean stopping work until additional training is done.

The standard also requires contractors to treat each new hire, no matter how experienced, as untrained; indeed, a journeyman sent from a union hiring hall must be treated as if he knows nothing about the hazards of his trade. The standard takes no cognizance of the fact that, unlike in manufacturing, employee turnover in construction is substantial; employees frequently move from job to job; construction employs a high number of temporary employees; and exposure to toxic substances varies widely. Most exposures occur outdoors where ventilation is not a problem.[21]

C. The Decision Below

Petitioners and representatives of other construction and non-manufacturing employers sought review of the revised standard,[22] which the court below denied.

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[21] It was precisely for these and other reasons related to the unique workplace conditions in the construction industry that OSHA provided, and the D.C. Circuit approved, a construction exemption from the OSHA standard governing exposure to inorganic lead. *See United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1309-10 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Association, Inc. v. Donovan*, 453 U.S. 913 (1981).

[22] Petitioners sought review in the Fourth Circuit. Associated Builders and Contractors, Inc. (ABC) and National Grain and Feed Association (NGFA) filed in the D.C. Circuit. United Technologies Corporation filed in the Second Circuit. The ABC petition was the

First, the court held that petitioners were "foreclosed by *USWA II*" from contending that non-manufacturers had not received adequate notice from the agency in 1982 that they might be regulated by the final hazard communication standard. Pet. App. 10a.[23] The court rejected the argument that it would be improper to estop petitioners from litigating this factual issue since they were not parties in *USWA II*. Citing its Internal Operating Procedures, the court held that in any event, "*USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so." Pet. App. 11a.

The court also rejected petitioners' contention that there was insufficient record evidence of a significant risk of material health impairment from exposure to toxic substances in construction and other non-manufacturing industries to justify the rule. The court held that the record on this issue had been reviewed in *USWA I* and *II*, that the record on the significant risk issue was unchanged, and that the panel was not free to disregard the

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first filed; therefore, the petitions were first transferred to the D.C. Circuit, which then granted a USWA motion to transfer the petitions to the Third Circuit. Before transferring the case, the D.C. Circuit granted a temporary stay of the standard. Pet. App. 69a. Upon transfer, the petitions were assigned to a panel of the Third Circuit different than the one which decided *USWA I* and *II*. The new panel continued the stay, Pet. App. 71a, and eventually modified it to apply only to construction workers. Pet. App. 73a. In October 1987, the Office of Management and Budget disapproved portions of the revised standard, including the multi-employer worksite requirements, under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. In *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) ("*USWA III*"), the panel which decided *USWA I* and *II* found those disapprovals improper. In issuing its decision, however, the panel also purported to deny the motion for a stay, apparently unaware that another Third Circuit panel had earlier granted it.

[23] Compare, *supra*, p. 6.

holdings of those prior opinions of the court. Pet. App. 12a.

The court further rejected the contention that OSHA is required to determine whether the degree of risk in a particular industry makes the requirements of the standard applicable to that industry "reasonably necessary" under section 3(8) of the Act. The court stated:

> This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard, the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance.

Pet. App. 13a.[24]

As to feasibility, the court noted that following its remand in *USWA I*, OSHA had examined the record developed for the manufacturing sector and concluded that it "contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector." Pet. App. 14a. On this issue, the court purported to decline substituting its judgment for that of the agency. *Id.* The court also opined that if the record was weak on the feasibility of the standard in non-manufacturing, the fault "may not be laid at OSHA's door," for "affected employers received notice of the [1982] rulemaking proceeding." *Id.*

In so finding, the court ignored OSHA's admission in its Petition for Rehearing that it construed its statute

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[24] Petitioners had not contended that the reasonable necessity for the standard must be assessed on a substance-by-substance basis. Rather, they urged that it be assessed in terms of the overall risk which construction—as opposed to manufacturing workers—face from exposure to toxic substances.

to require a feasibiilty showing "on an industry basis", Pet. Rehearing at 8; that it was improper to shift the burden of proof onto the proponents of nonfeasibility, *id.* at 11; that OSHA had in fact "not passed upon" the issue of feasibility in non-manufacturing"; and that "[t]he existing [1982] record contained *no* evidence of that nature with respect to the non-manufacturing industries." *Id.* at 8. (emphasis in original).

REASONS FOR GRANTING THE WRIT

A. The Third Circuit's Ruling that the Act Requires OSHA to Make Only a General Finding of Significant Risk in All Potentially Covered Industries Conflicts with Decisions of the Fifth, District of Columbia and Fourth Circuits and Raises a Key Issue in the Administration of the Act.

As noted, the court below held that for the revised hazard communication standard, the significant risk requirement of Section 6(b)(5) of the Act "must of necessity be satisfied by a general finding concerning all potentially covered industries." Pet. App. 13a. This holding conflicts with the rulings of several circuits that have required OSHA standards to be supported by industry-specific findings as to the existence of a significant risk.

In *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980), for example, the Fifth Circuit struck down OSHA's cotton ginning standard because OSHA had improperly assumed that it could extrapolate studies of the acute health effects of cotton dust exposure in cotton manufacturing industries to cotton dust exposure in the ginning industry.[25] Utilizing an analysis particularly apt here, the Fifth Circuit emphasized that

[25] The Fifth Circuit decision was criticized by this Court in *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) ("*ATMI*"), but on an entirely different point. 452 U.S. at 510 n.30.

OSHA could not use the risk data in one industry to regulate another industry, where the working conditions were different. The court observed that, unlike workers in cotton manufacturing, ginning workers are seasonal and transient, and perform most of their work outdoors. "These different conditions in the ginning industry yield significantly reduced exposure to cotton dust," the court said, with potentially different conclusions as to the risk of exposure in that industry. 630 F.2d at 409.

The Fifth Circuit's holding thus is clearly in conflict with the Third Circuit's decision in this case. The difference between the risk of material harm from exposure to toxic substances in manufacturing versus construction is at least as great as the inter-industry differences noted by the Fifth Circuit in the cotton dust case. Manufacturing is generally indoors, where limiting toxic substance exposure often depends heavily on ventilation, while construction is generally outdoors. The manufacturing sector employs a generally stable workforce with fixed workplaces, so that exposures are essentially constant and consistent. In contrast, construction is characterized by frequent employee turnover, short-duration jobs, and a working environment which changes constantly. These differences preclude any assumption that the risk of harm from worker to toxic substances in construction is likely to be the same as it is in manufacturing.[26]

Indeed, it was principally because of these differences that OSHA exempted construction from its lead standard. The D.C. Circuit approved the exemption on review, in part based on its finding that "the construction industry differs from other industries with lead exposures in sev-

[26] As noted, *supra*, when it decided not to apply the original standard to construction, OSHA recognized that the risks in construction were less likely than in manufacturing, and that training in hazard recognition and avoidance was already required in construction under 29 C.F.R. § 1926.21(b).

eral important ways." *United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d at 1309-10. *See also, Building & Construction Trades Dep't v. Brock*, 838 F.2d 1258, 1279 (D.C. Cir. 1988) (medical program for construction workers not as extensive as for general industry workers because of high turnover and transient workforce).[27] Similarly, the Fourth Circuit approved exemption of the oil and gas drilling industry from OSHA's hearing conservation standard because the agency planned to address elsewhere the "unique hazards" in that industry. *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1455 (4th Cir. 1985) (en banc).

In sum, the decision below is in conflict with decisions of several other circuits which have recognized that OSHA cannot overgeneralize or assume that risks of harm in one industry are the same in all others, even if the hazards appear to be the same. As this Court stated in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 662 (1980) ("*API*"), "assumptions are not a proper substitute for the findings of a significant risk of harm required by the Act."

Few issues are more fundamental to OSHA's ability to fulfill its mission of developing safety and health standards protecting American workers. This is particularly significant now, because OSHA is currently in the midst of a massive "generic"—rather than substance-by-substance—rulemaking to revise exposure limits for hundreds of toxic substances in most industrial sectors.[28] Because this rulemaking excludes construction, maritime and agriculture,[29] however, it is virtually certain that

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[27] As noted *supra*, p. 6, it was precisely because OSHA recognized these potential differences in the degree of toxic substance exposure as between manufacturing and construction that it initially declined to apply the hazard communication standard to construction.

[28] *See* 53 Fed. Reg. 20960 (June 7, 1988).

[29] 53 Fed. Reg. 20979.

the conflict presented here—whether findings of significant risk in one industry or industrial sector can be assumed to be applicable in others—will be a recurring problem in the administration of the OSH Act. This Court, therefore, should grant the writ to resolve this important conflict and provide guidance for rulemaking that presently is in progress.

B. In Ruling that it Was Sufficient for the Secretary to Find that the Record Contained No Evidence that the Standard Would Not Be *Infeasible* for Any Industrial Sector, the Decision Below Creates Conflicts with the District of Columbia and Fourth Circuits, Another Panel of the Third Circuit, and the Agency's Understanding of Its Own Statute.

The court below ruled that "as this court's remand [in *USWA I* and *II*) required, the Secretary examined the same [1982 manufacturing] rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector." Pet. App. 14a. In ruling that an absence of proof of infeasibility is enough to support a determination of feasibility, the decision below conflicts with several circuits and with the agency's own understanding of section 6(b)(5) of the Act.

As OSHA itself stated in its petition for rehearing in *USWA II*:

> Courts reviewing OSHA standards establishing exposure limits for toxic substances have ruled that the Secretary should establish feasibility on an industry basis and that a determination of economic feasibility requires a finding as to the estimated cost of the standard to the industry and its effect on the industry's long-term profitability. See *ATMI, . . . United Steelworkers of America v. Marshall* (lead) 647 F.2d 1189, 1172 (D.C. Cir. 1981); *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1452-1453 (4th Cir. 1985) (en banc).

* * * *

> The panel, moreover, has apparently shifted the burden of proof onto the proponents of nonfeasibility or at least has improperly lowered the burden the Secretary bears to establish the feasibility of the standard. * * * Placing a burden on the Secretary to demonstrate infeasibility would be contrary to precedent . . . .

Pet. Rehearing at 8, 11-12.[30]

As the D.C. Circuit has stated, "[w]hen affected parties petition for pre-enforcement review of an OSHA standard, the standard must pass a preliminary test of general feasibility." *United Steelworkers of America v. Marshall, supra*, 647 F.2d at 1272. The statutorily mandated task is not to determine whether it has been proven that the standard will be infeasible; OSHA must affirmatively "prove feasibility." *Id.* at 1265. *Accord, Forging Industry Ass'n v. Secretary of Labor, supra*, 773 F.2d at 1452 ("the feasibility analysis involves an inquiry to determine whether a standard is both technologically and economically feasible").

As did the D.C. Circuit in the lead case, reviewing courts have both required and undertaken an industry-by-industry analysis of feasibility, even if that task is difficult. *See United Steelworkers of America, AFL-CIO v. Marshall, supra*, 647 F.2d at 1274, 1277-1310. *Accord AFL-CIO v. Marshall*, 617 F.2d 636, 669 (D.C. Cir. 1979), *aff'd in part, vacated in part and remanded*, 452 U.S. 490 (1981) (In D.C. Circuit cotton dust decision, court made industry-by-industry feasibility analyses and rejected OSHA's feasibility analysis for the cottonseed oil industry); *Forging Industry Ass'n v. Secretary of Labor, supra* (court recognized unique work-

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[30] In *ATMI, supra*, this Court quoted approvingly the Secretary's assertion that to satisfy the Act as to the showing required for the economic feasibility, "[a]t bottom, the Secretary must . . . determine that the industry will maintain long term profitability and competitiveness." 452 U.S. at 530 n.55.

place conditions of gas and oil drilling industry as basis for exempting industry from coverage of hearing conservation standard). Indeed, another Third Circuit panel remanded the coke ovens standard to OSHA for further consideration as to how it would apply to independent contractors who maintain and repair coke oven batteries, in part because the standard did "not address the particular problems faced by independent contractors . . ." *American Iron and Steel Institute v. OSHA*, 577 F.2d 825, 840 (3d Cir. 1978), *cert. dismissed*, 448 U.S. 917 (1980).

In sum, the decision below conflicts with several Circuits on another key issue in the promulgation of OSHA standards—*i.e.*, who bears the burden to prove feasibility and what is required to satisfy that burden. The significance of this conflict to the administration of the OSH Act is manifest and is another compelling reason for granting the writ.[31]

C. This Case Presents an Ideal Vehicle in Which to Clarify an Important Issue Which This Court Raised but Did Not Decide in *ATMI*, *i.e.*, Whether the "Reasonably Necessary" Language of Section 3(8) Imposes Restraints on OSHA Beyond Those of Showing Feasibility Under Section 6(b)(5).

In *ATMI*, this Court addressed the meaning of the term "feasible" in section 6(b)(5) of the Act, and rejected the contention that this section requires OSHA to perform a cost-benefit analysis of its standards. However, the Court expressly left open the question whether section 3(8) "might not impose additional restraints on OSHA." *ATMI*, 452 U.S. at 513 n.32. The Court declined there to rule on "all the applications that § 3(8) might have, either alone or together with § 6(b)(5)." *Id.*

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[31] The circuit conflict on the applicable law will remain significant regardless of whether OSHA now contends that the record proves the feasibility of the extended standard in non-manufacturing industries.

Here, although the issue was squarely raised to it, the court of appeals simply refused to consider whether the elaborate information dissemination scheme which OSHA developed for manufacturing is "reasonably necessary or appropriate" for construction within the meaning of Section 3(8), given the lesser or at least different degree of risk from exposure to toxic substances on construction worksites. Rather, the court simply proceeded as though the only requirement the standard had to meet was feasibility. This Court's comment in *ATMI*, however, suggests that the approach taken by the Third Circuit here may reflect an oversimplified view of the Act's requirements. *See also API, supra*, 448 U.S. at 662 (no finding that ban on dermal contact with benzene was " 'reasonably necessary or appropriate' to remove a significant risk of harm . . .").

In addressing the potential meaning of Section 3(8) in *ATMI*, this Court suggested, as an example, that

> if the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five was ". . . feasible," and OSHA thus insisted on the use of five, then the "reasonably necessary and appropriate" limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard.

452 U.S. at 513 n.32. The court below failed to appreciate that the same issue is raised here. Thus, it failed to consider, for example, whether it is "reasonably necessary or appropriate" to require construction employers to have the technical MSDSs physically present on every construction jobsite, or to require them to provide redundant hazard training to experienced construction tradesmen each time they move from job to job.

The contrast between the simplified approach taken by the court of appeals here and the more analytical one suggested by this Court in *ATMI* highlights a need for clarification of this important but as yet unanswered question under the Act. Indeed, the Fifth Circuit has

recently struggled with the meaning of the *ATMI* discussion of section 3(8), commenting *inter alia* that this "Court has sent somewhat confusing signals" as to aspects of its meaning. *National Grain and Feed Ass'n v. OSHA*, 858 F.2d 1019, 1034 (5th Cir. 1988). This case presents an ideal vehicle in which to provide this much-needed clarification.

D. Review Is Warranted to Clarify How This Court's *Chevron* and *Vermont Yankee* Tests Apply to Judicial Review of OSHA's Interpretations of Its Enabling Statute and to Resolve Conflicts in the Circuits as to the Circumstances in Which a Reviewing Court Should Compel Agency Rulemaking.

This Court has made clear that where "Congress has not directly addressed the precise question at issue," a reviewing court must refrain from any statutory interpretation of its own and must simply determine "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *Accord INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

As this Court's decisions in *API* and *ATMI* make plain, the precise meaning of sections 6(b)(5) and 3(8) of the Act is far from clear.[32] It is plain from a comparison of the Secretary's Petition for Rehearing in *USWA II*, the decision below, and *USWA I* and *II*, however, that the Third Circuit substituted its judgment for that of OSHA as to the meaning of section 6(b)(5); this is especially so as to the burden of proof OSHA must satisfy to support its standards. If the agency's

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[32] Indeed, Chief Justice Rehnquist has maintained that given the ambiguity in the legislative history, section 6(b)(5) is an unconstitutional delegation of authority to the Executive Branch to make the " 'hard policy choices' which are properly the task of the legislature." *ATMI, supra*, 452 U.S. at 543 (Rehnquist, J., dissenting).

interpretation of its statute were permissible, the court below violated the rule of *Chevron* and its progeny.[33]

Furthermore, the usurpation of OSHA's responsibilities did not stop in this case with the interpretation of the OSH Act's *substantive* requirements. Rather, the court of appeals also dictated to OSHA the *procedures* to be followed in deciding whether or not to extend the coverage of the original hazard communication standard to other industries. Specifically, it ordered OSHA to decide that issue without giving further notice to affected interests or conducting further evidentiary proceedings, despite the agency's repeated protestations that it needed to give notice and take additional evidence before rendering its decision.

In this respect, the decision below also conflicts with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). There, a court of appeals, in rejecting a rule promulgated by the Atomic Energy Commission, had sought to dictate to the agency the procedures which the court felt should have been followed in the rulemaking proceedings. This Court held that the court of appeals had overstepped the bounds of judicial review. As this Court stated, "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Id.* at 524. The Court went on to admonish the courts of appeals not to "stray beyond the judicial province to explore the procedural format or to impose upon the agency [their] own notion of which procedures are 'best' or most likely

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[33] One commentator has suggested that had this Court adopted the *Chevron* test before it decided *ATMI* and *API*, "the Court probably would have resolved each case with a single unanimous opinion." R. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vanderbilt L. Rev. 301, 311 (March 1988).

to further some vague, undefined public good." *Id.* at 550.

The court of appeals clearly failed to heed that admonition here; instead, it strayed beyond its province to forbid OSHA to take additional evidence and to compel it instead to render a decision based on a record the agency considered inadequate for that purpose. Accordingly, this Court should grant the writ to reinforce its views as to the proper role of a reviewing court as to issues of statutory interpretation and the selection of the procedures to be followed in carrying out an agency's statutory mandate.

A grant of review here would also enable this Court to resolve a conflict in the circuits over the circumstances in which a reviewing court should compel OSHA rulemaking. In *USWA I*, the court below held that OSHA's decision not to issue a standard for non-manufacturing was reviewable, notwithstanding the discretion afforded the agency in priority-setting under section 6(g) of the Act. The test for review under that section, the court said, is that:

> Once a standard has been promulgated, however, the Secretary may exclude a particular industry only if he informs the reviewing court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards.

Pet. App. 40a. Moreover, as noted, in *USWA II*, the court again substituted its judgment for OSHA's by holding that the agency was not permitted to collect additional evidence before deciding whether to extend the standard to other industries, but was compelled to base its decision solely on the original rulemaking record.

Plainly, the standard here in question would not have been issued absent the *USWA I* decision that "the Secre-

tary . . . failed to carry the burden of persuading . . . that section 6(g) justifies limitation of coverage to the manufacturing sector." Pet. App. 40a. Likewise, it is clear that the content of the administrative record in this case would have been very different but for the decision in *USWA II* barring the Secretary from considering any further evidence. Thus, these elements of the decision in *USWA I* and *USWA II* are properly now presented to this Court for review.

These same elements of those decisions also squarely conflict with several rulings of the D.C. Circuit, which has articulated a much more exacting standard for judicial intervention into OSHA's priority-setting. In *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196 (D.C. Cir. 1977), the court rejected the contention that once OSHA has commenced rulemaking addressing a particular hazard, its discretion to set priorities does not permit it to stop. The court replied that "this makes an absurdity of the Act and a fool out of Congress." *Id.* at 1199. Under section 6(g), the court held, OSHA may reorder its priorities "so long as [its] discretion is honestly and fairly exercised." *Id.* at 1200. *Accord, National Congress of Hispanic American Citizens (El Congresso) v. Marshall*, 626 F.2d 882, 888 (D.C. Cir. 1979) ("So long as [the] action is rational in the context of the statute, and is taken in good faith, [OSHA] has authority to delay development of a standard at any stage as priorities demand.").

As this case illustrates, those who disagree with OSHA's rulemaking priorities increasingly seek judicial review. It thus is important for this Court to resolve the circuit conflict as to the test which governs the circumstances under which a reviewing court should review the order in which OSHA chooses to develop standards.

E. By Holding that Petitioners are "Foreclosed" From Litigating Issues Which Affect Only Them and Which Were Decided in Their Absence in *USWA I* and *II*, the Decision Below Creates an Incentive for Protective Interventions in Future Agency Rulemaking Proceedings Which Will Substantially Burden the Federal Regulatory Agencies and the Courts.

Although they were not then parties, the court below held that petitioners were "foreclosed" by *USWA I* and *II* from litigating factual questions decided there which affected only them,[34] *i.e.*, that they had received adequate notice in 1982 that the standard might eventually regulate them,[35] and that OSHA properly found significant risk as to all industries based on the 1982 rulemaking record.[36] When the original standard was issued, however, petitioners were not then adversely affected within the meaning of section 6(f) of the Act; they would thus have lacked standing to seek judicial review of the standard. *See Fire Equipment Mfrs. Ass'n, Inc. v. Marshall*, 679 F.2d 679 (7th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). To preserve their right to challenge these findings, therefore, petitioners would have had to intervene in the proceedings brought to challenge OSHA's decision not to regulate outside the manufacturing sector.

The result below thereby turns the law of standing on its head. As this Court has stated:

> There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80 (1978).

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[34] Pet. App. 10a.

[35] *Id.* at 11a.

[36] *Id.* at 12a.

If the decision below is not overturned, the federal courts and private litigants will be burdened with needless intervention litigation. For, as we have shown, OSHA frequently regulates some but not all industries under standards addressing particular hazards. In such instances, whenever a standard's underinclusiveness is challenged on review, all industries not covered will have to consider seeking to intervene; otherwise, they may be barred from full judicial review of the standard later. This Court should grant the writ to make clear that under traditional standing principles and section 6(f) of the Act, persons adversely affected by OSHA standards will enjoy a full right of judicial review once a standard purports to regulate them, and will not be barred by factual decisions affecting their rights made in their absence.

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully submit that this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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December 28, 1988

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF LABOR

Argued: September 16, 1988
Before: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed: November 25, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Before the court are four petitions for review of the revised hazard communication standard promulgated by the Secretary of Labor pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (OSH Act). The petitioners are the Associated Builders and Contractors, Inc. (ABC), the National Grain & Feed Association, Inc. (NGFA), the Associated General Contractors of Virginia, et al. (AGC), and United Technologies Corporation (UTC). These petitions were initially filed in the District of Columbia Circuit, the Second Circuit, and the Fourth Circuit. Since the filing in the District of Columbia Circuit was earliest, the other petitions were transferred and consolidated there. Thereafter, the Building and Construction Trades Department, AFL-CIO intervened, and on the motion of the intervenors the petitions were transferred to this court. The transfer order was made because the hazard review standard was before this court on three prior occasions. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*USWA I*); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*); *United Steelworkers of American v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). Because those prior decisions are controlling, we will deny the petition for review.

I.

In USWA I this court ordered the Occupational Safety and Health Administration (OSHA) to apply its recently promulgated hazard communication standard not only to the manufacturing sector, but to the non-manufacturing sector as well, unless the agency could "state reasons

why such application would not be feasible." 763 F.2d at 739. Except for a part of its treatment of trade secrets, the hazard communications standard was otherwise upheld. 763 F.2d at 743.

In *USWA II*, the petitioners in *USWA I* returned to the court seeking to enforce the judgment in that case. OSHA, following the *USWA I* judgment, had issued a notice of proposed rulemaking, claiming that the record was insufficient to determine the issue of feasibility of the standard outside the manufacturing sector. This court held that OSHA was not in compliance with the *USWA I* judgment, which did not contemplate notice and comment. It ordered OSHA to promulgate, within 60 days, a hazard communications standard applicable to all workers covered by the OSH Act, or state reasons separately, as to each category of excluded workers, why, on the basis of the present administrative record, a hazard communication standard is not feasible. 819 F.2d at 1270.

In *USWA III* the original petitioners moved for further relief in enforcement of the *USWA I* judgment. By then OSHA had on August 24, 1987, published an expanded hazard communication standard applicable to all industries. 52 Fed. Reg. 31852 et seq. (codified at 29 C.F.R. § 1910.1200). This revised standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). OMB, ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, 44 U.S.C. § 3506 et seq. (Supp. 1988), sought public notice and comment "on the recordkeeping, notifications, and other paperwork requirements of the revised standard." 52 Fed. Reg. 36652. Following a public hearing OMB purported to disapprove three provisions which the revised standard adopted. These three new provisions were: (1)

a requirement that at multi-employee worksites employers exchange Material Safety Data Sheets obtained from chemical manufacturers, 29 C.F.R. § 1910.1200(e)(2); (2) an exemption from the labeling requirements of the standard for consumer products used in the same manner and qualities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). This court held that the regulations disapproved by OMB did not involve the collection of information within the meaning of the Paperwork Reduction Act. 855 F.2d at 113. Summarizing the prior history of the case, we noted:

> In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA II we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved

> by OMB was accordingly inconsistent with those orders. Relief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *USWA II*, 819 F.2d at 1270.

855 F.2d at 113-14.

II

The present petitioners, unlike those who were the moving parties in *USWA I*, *II*, and *III*, seek to prevent enforcement of the hazard communication standard. Their objections include both procedural and substantive challenges to the promulgated standard.

A.

Sufficiency of Notice of Rulemaking

The four petitioners contend that OSHA violated section 6(b) of the OSHA Act, 29 U.S.C. § 655(b), by failing to provide adequate notice of proposed rulemaking affecting their industries. That contention is foreclosed by *USWA II*, which exhaustively detailed the fact that the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding. The court wrote:

> On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed. Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous material labeling." *Id.* at 5,373. Among the topics on which comments were requested was

> "[s]upported cost data of the estimated costs of coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendation, was addressed to all employers, not only to employers in the manufacturing sector.

819 F.2d at 1265. In the same opinion, this court recognized that the 1982 notice was at least as explicit. That notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included. *Id.* at 1266. Thus this court's holding that the Secretary provided adequate notice to all employers was clearly stated.

The four petitioners urge that since they were not parties to the initial petition for review, they are not bound by the prior panel decision. OSHA, on the other hand, contends that the discussion of the notice of rulemaking in *USWA II* is law of the case. We need not resolve that difference, however, because in any event the facts with respect to the 1981 and 1982 notices have not changed, and a prior panel has applied the law to those facts. Thus *USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, 8C. Nor are we of such a mind. The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected.

B.

The Significant Risk Finding

Several of the petitioners contend that the hazard communication standard is invalid because it was promulgated without a significant risk determination. Under

Sections 3(8) and 6(b)(5) of the OSH Act, 29 U.S.C. §§ 652(8), 655(b)(5), the Secretary must determine that there exists a significant risk of harm to employees and that a standard is reasonably necessary or appropriate to reduce that risk. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 614-15, 639 (1980) (plurality opinion).

The agency record on this issue was reviewed by this court in USWA I. The court upheld OSHA's finding that a section 6(b)(5) standard is required to address a significant risk to workers. 763 F.2d at 735. The significant risk finding applied to all workers who would be exposed to hazardous chemicals. *Id.* at 738. Indeed, the court noted the incongruity of protecting spray painters, for example, in the manufacturing sector, but not in construction. *Id.* at 737.

The agency record on this issue was reviewed once again in *USWA II*. In that case we ordered OSHA, on remand, to consider solely the feasibility of the standard outside the manufacturing sector, not to reestablish its need. 819 F.2d at 1270. As with the treatment of the notice issue in *USWA I* and *USWA II*, the record on the significant risk issue is unchanged, and this panel is not free to disregard the holdings in those prior opinions of the court.

Petitioners, ABC, AGC, and NGFA, contend that those opinions did not address their specific contention, that OSHA must make a significant risk determination separately for each industry: in this case, construction and grain processing or storage. We do not interpret the opinions so narrowly. The standard was approved for the manufacturing sector, which has twenty major Standard Industrial Classification (SIC) Code subdivisions. There is no more obvious need for industry specific significant risk determinations for the construction and grain industries than for subdivisions of the manufacturing sector. The holdings in USWA I and USWA

II sustained a general significant risk finding. Assuming, however, that those opinions were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different. This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible. We reject, as well, the contention by ABC and AGC that because the construction industry already provides training in hazardous materials handling, there is no significant risk in that industry. At best that argument establishes the existence of risks, and the requirement for maintenance on the jobsite of information on those risks can only make the existing training more effective. As to risks posed by grain dust, the propensity of grain elevators to blow up has been well documented.

C.

The Feasibility Determination

Several petitioners contend that the Secretary's feasibility determination, made after the remand in USWA II, is not supported by the rulemaking record. Unlike the notice of rulemaking and significant risk issues, the feasibility determination, outside the manufacturing sector, has not previously been addressed by this court. Our review of that determination asks whether "the Secretary carried out [her] essentially legislative task in a manner reasonable under the state of the record before [her]." *Synthetic Organic Chemical Mfrs. Ass'n v. Bren-*

nan, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) (quoting *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974)).

When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. The Secretary had, prior to our remand in *USWA I*, already established that the employee training and the maintenance of labels and material safety data sheets is feasible in the manufacturing sector, encompassing a spectrum of SIC Code subdivisions with employers of all sizes. As this court's remand required, the Secretary examined the same rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector. That conclusion is on the agency record completely supportable, and we are not permitted to substitute our legislative judgment for that of OSHA. If there are deficiencies in that record they may not be laid at OSHA's door, for as we hold in Part II A above, the affected employers received notice of the rulemaking proceeding.

D

The Unlawful Delegation Contention

One final substantive challenge to the hazard communication standard is advanced on behalf of NGFA, which contends that OSHA unlawfully delegated its rulemaking authority to the American Conference of Government Industrial Hygienists (ACGIH) when OSHA incorporated in the standard that organization's Threshold

Limit Values for Chemical Substances and Physical Agents in the Work Environment. ACGIH is an impartial scientific organization which identifies safe exposure levels for various substances.

This court in *USWA I* decided the delegation question when it held, over the objections of the petitioner Public Citizens, and the State of New Jersey as *amicus*, that OSHA need not itself evaluate specific chemical hazards, but could rely on information developed by chemical manufacturers. 763 F.2d at 739. The reliance on ACGIH is an *a fortiori* case, and *USWA I* controls. Even if it did not control, we would in any event reject the unlawful delegation contention. It was appropriate to adopt ACGIH's list as a floor, while imposing on chemical manufacturers the requirement that they research and assess hazards independently. 29 C.F.R. § 1910.1200 (d)(3). That action was fully consistent with section 6(b)(5) of the OSH Act, which directs OSHA to set toxic substance standards based on "the best available evidence" with due consideration to "the latest available scientific data."

III

None of the substantive or procedural challenges to the application of the hazard communication standard to the construction or grain processing and storage industries have merit. The petitions for review of ABC, AGC, and NGFA will therefore be denied. The stay of those standards granted by a panel of this court on June 24, 1988, shall be vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)

United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ORDER AMENDING OPINION

The slip opinion in the above matter, filed November 25, 1988, is hereby amended as follows. The penultimate sentence of section III on page 16 should read: "The petitions for review of ABC, AGC, NFGA, and UTC will therefore be denied."

/s/ John J. Gibbons
Chief Judge

Dated: December 5, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATURAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF THE REVISED HAZARD COMMUNICATION STANDARD PROMULGATED BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

Present: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the Occupational Safety and Health Administration, United States Department of Labor and were argued by counsel September 16, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review of the revised hazard communication standard promulgated by the said Administration and published at 52 Fed. Reg. 31852, et seq. (August 24, 1987), be, and the same are hereby denied. It is further ordered that the stay of the said standard granted by a panel of this Court on June 24, 1988 is vacated. Costs taxed against the petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

November 25, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New York, the State of New Jersey, the State of Connecticut, and National Paint & Coatings Association,
Intervenors.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, American Petroleum Institute & Atlantic Richfield Company, and National Paint & Coatings Association,
Intervenors.

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, National Paint & Coatings Association, American Petroleum Institute & Atlantic Richfield Company,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, United States Department of Labor,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR and John Donovan, Secretary of the United States Department of Labor,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent.

Argued March 18, 1985

Decided May 24, 1985

Before GIBBONS, Circuit Judge, and FISHER, Chief Judge* and KELLY, District Judge**

OPINION OF THE COURT

GIBBONS, Circuit Judge:

This case involves consolidated petitions for judicial mulgated by the Secretary of Labor on the authority of the Occupational Safety and Health Act of 1970 (OSH Act),[1] Pub.L. 91-596, 84 Stat. 1590, 92 U.S.C. § 651 *et*

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] Petitions for judicial review of the standard were filed on November 22, 1983, in this Court by the United Steelworkers of America, AFL-CIO, and by Public Citizen, Inc., representing itself and a number of labor groups. Motions so intervene in these cases were received from the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit (No. 84-1063; Jan. 24, 1984);

seq. (1982). Certain intervenors challenge our jurisdiction to consider the petitions pursuant to 29 U.S.C. § 655(f) (1982), contending that the action under review is a regulation rather than a standard. Petitioners and the Secretary urge that we have jurisdiction. Petitioners and intervenors challenge the standard on several substantive grounds, while the Secretary defends it. We conclude that the petitions for review are properly here, and thus address the substantive challenges.

I.

Evolution of the Standard

Section 6 of the OSH Act directs the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §§ 651(b) and 655(b)(1) (1982). Any standard promulgated by the Secretary

> shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(b)(7) (1982).

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the State of New York in the Second Circuit (No. 83-4220; Dec. 20, 1983); the State of Illinois in the Seventh Circuit (No. 84-1111; Jan. 23, 1984); the Flavor and Extract Manufacturers' Association in the Fourth Circuit (No. 83-2151; Dec. 12, 1983); and the Fragrance Materials Association in the District of Columbia Circuit (No. 84-1021; Jan. 18, 1984). These cases were subsequently transferred to this Court and consolidated in this proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association have since been withdrawn.

In 1974, the National Institute for Occupational Safety and Health (NIOSH), an agency created by section 22 of the OSH Act, 29 U.S.C. § 671 (1982), recommended that the Secretary promulgate a standard requiring employers to inform employees of potentially hazardous materials in the workplace. 47 Fed.Reg. 12095 (1982). Later that year the Secretary appointed an advisory committee to develop standards for implementation of the statutory provision requiring labels or other appropriate forms of warning. That advisory committee issued its report on June 6, 1975, recommending a classification of hazards, the use of warning devices such as labels and placards, disclosure of chemical data, and employee training programs. *Id.* at 12096.

The 1975 Committee report did not result in prompt action by the Secretary. In 1976 a House of Representatives subcommittee held oversight hearings during which several committee members expressed concern over the Secretary's failure to promulgate a comprehensive Hazard Communication Standard. *Control of Toxic Substances in the Workplace: Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 94th Cong. 2d Sess. 87, 89-90 (1976). Seventeen months later, the full House Committee on Government Operations issued a Report which criticized the agency for "miserly use of its delegated powers to deal with disease and death-dealing toxic substances." House Comm. on Government Operations, *Failure to Meet Commitments Made in the Occupational Safety and Health Act*, H.R.Rep. No. 710, 95th Cong., 1st Sess. 13 (1977). The Committee concluded that:

> The Department of Labor should exercise its power under the Occupational Safety and Health Act to insure that employers and workers can and will know what kinds of toxic dangers are present in the Nation's workplaces. OSHA should require chemical

> formulators to identify any regulated substance in products they sell.

Id. at 15.

Eventually, on January 16, 1981, the agency published a notice of proposed rulemaking entitled "Hazards Identification." 46 Fed.Reg. 4412-53. The standard proposed would be applicable to employers in Division D, Standard Industrial Classification Codes 20-39, which include only employers in the manufacturing sector. *Id.* at 4426. This classification of employers is made by type of activity for the purpose of promoting uniformity and comparability in the presentation of statistical data. Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual 9* (1972). This initial proposal was withdrawn by the Secretary on February 12, 1981, for further consideration of regulatory alternatives. 46 Fed.Reg. 12214. The notice of proposed rulemaking which resulted in the rule challenged in the instant proceedings, entitled "Hazard Communication," was published on March 19, 1982. 47 Fed.Reg. 12091. Like the January 16, 1981 proposal, it was limited to employers in the manufacturing sector. The most significant difference from the rule proposed in 1981 was the inclusion in the March 19, 1982 proposal of a trade secret exception to the requirement that the chemical identities of all hazardous chemicals be disclosed. *Compare* 46 Fed.Reg. 4426 (1981) *with* 47 Fed.Reg. 12105 (1982).

The standard was published in its final form on November 25, 1983. 48 Fed.Reg. 53279. It requires that chemical manufacturers and importers "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200 (d)(1) (1984). It refers to several compilations of toxic materials. These lists establish a floor of toxic substances which chemical manufacturers or importers must treat as

hazardous. 29 C.F.R. § 1910.1200(d)(3) (1984). Chemicals not included in the designated compilations must be evaluated for hazardousness by reference to "available scientific evidence." 29 C.F.R. § 1910.1200(d)(2) (1984). A manufacturer or importer of chemicals found to be hazardous must "ensure that each container . . . leaving the workplace is labeled" with the chemical identity, with appropriate hazard warnings, and with the name and address of the source. 29 C.F.R. § 1910.1200 (f)(1) (1984). Manufacturers or importers must also prepare a "material safety data sheet" (MSDS) containing the chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 29 C.F.R. § 1910.1200(g) (1984). The MSDS must be provided to each employer in the manufacturing sector (Standard Industrial Classification Codes 20-39) purchasing a hazardous chemical. That employer must in turn make the MSDS available for employee inspection, 29 C.F.R. § 1910.1200(g)(8) (1984), and "shall provide employees with information and training on hazardous chemicals in their work area. . . ." 29 C.F.R. § 1910. 1200(h) (1984).

The rule allows an exception from the labeling and MSDS ingredient disclosure requirements when a chemical manufacturer or importer claims that the chemical identity is a trade secret. 29 C.F.R. § 1910.1200(i) (1984). In such a case, the manufacturer or importer must provide a MSDS disclosing the hazardous properties of the chemical and suggesting appropriate precautions. in the case of a medical emergency, the manufacturer or importer must disclose the chemical identity to a treating physician or nurse, and may later require such a health professional to sign a confidentiality agreement. 29 C.F.R. § 1910.1200(i)(2) (1984). Absent a medical emergency, the manufacturer or importer may be required to disclose the chemical identity to a health professional who makes a written request detailing the

occupational need for the information, and who is willing to sign a confidentiality agreement containing a liquidated damages clause. 29 C.F.R. § 1910.1200(i)(3) & (4) (1984). In no case is the manufacturer required to disclose the precise formula, as opposed to the identity of chemicals in the compound.

The rule provides expressly that:

> [t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

29 C.F.R. § 1910.1200(a)(2) (1984). Thus, at least insofar as they might require hazard communication to employees in the manufacturing sector, state hazard disclosure laws are claimed to be preempted by the rule.

II.

Jurisdiction Under Section 6(f) of the OSH Act

Congress has in section 6 of the OSH Act authorized the Secretary to issue health and safety standards. 29 U.S.C. § 655 (1982). In section 8(c)(3) of the Act, Congress also authorized the Secretary to issue regulations requiring employers to keep records and inform employees of worker exposure to potentially toxic materials or harmful physical agents. 29 U.S.C. § 657(a)(3) (1982). Classification of the Hazard Communication Standard as a section 6 standard or a section 8 regulation will have two interrelated consequences.

First, Congress has vested in the courts of appeals jurisdiction over challenges to the validity of section 6 standards. 29 U.S.C. § 655(f) (1982). Congress has made no such decision with respect to judicial review of section 8 regulations. These are reviewable in the district courts pursuant to the Administrative Procedure Act.

5 U.S.C. § 703 (1982). Thus if the Hazard Communication Standard is a section 8 regulation the only course open to us would be to transfer the petitions for review to an appropriate district court. 28 U.S.C. § 1631 (1982). A court of appeals would reach the merits of a dispute over a regulation, therefore, only on an appeal from a judgment of the district court.

Second, by whatever route the case arrived in a court of appeals, whether the challenged rule is a section 6 standard or a section 8 regulation affects its preemptive effect on state law. Section 18(a) of the OSH Act provides explicitly:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a) (1982). If, however, a section 6 standard has been adopted, the role of the states is circumscribed by section 18(b) which provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (1982). The Secretary must accept such a state plan if it "will be at least as effective in providing safe and healthful employment" as the OSHA standards. 29 U.S.C. § 667(c)(2) (1982).

The intervenor states all have hazard disclosure laws which, if not preempted, would be operative in the manufacturing sector. None contend, however, that they have

submitted and have obtained approval of their plans pursuant to section 18. Given the explicit language of sections 18(b) and (c), the conclusion is inescaable that if the rule in issue is a section 6 standard it preempts state law until a state obtains section 18 approval of a state plan. It is not likely that the states challenging the rule will seek such approval, for section 18 contemplates that if they do so, they take on the fiscal burdens of enforcement now borne by the United States. 29 U.S.C. § 667(c)(5) (1982).

Since the disclosure requirements of laws adopted by the intervening states are in several respects stricter than those adopted by the Secretary, it is not surprising that those states would have us classify the challenged rule as a section 8 regulation rather than a section 6 standard. The preemptive effect of a section 8 regulation is not dealt with explicitly in the OSH Act, and any implied preemption would require a finding that is impossible to comply with both federal and state law, or that "the state law stands as an obstacle to the accomplishment and the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). It is not likely that we could make either such finding.

The agency decision to include in its rule an express provision preempting state law would, if the rule is a section 8 regulation rather than a standard, be reviewable pursuant to the Administrative Procedure Act. *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). The Secretary's inclusion of an express reference to preemption in the manufacturing sector appears to have been motivated at least in part by the desire to reduce the regulatory burden posed by multiple state laws. 48 Fed. Reg. 53284 (1983). That purpose is arguably at odds with congressional intention that the OSH Act provide

a federal floor for safety in the workplace. Reduction of burdens posed by multiple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not. Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, Pub.L. No. 91-596, at 144, 413, 444 (1971). We need not, however, decide whether preemption would be implied, or whether the preemption provision of the rule itself is valid as section 8 regulation, if we conclude that the rule is a section 6 standard, for, as noted above, such standards are explicitly preemptive under the statute.

The Act provides no definition of the term "regulation." The term "occupational safety and health standard" is defined as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

29 U.S.C. § 652(8) (1982). This definition is not helpful in the task of differentiating between standards and regulations, for it can hardly be said to exclude the dictionary definition of the term regulation.

The states urge that the difference between section 6 standards and section 8 regulations must be determined by looking at the separate purposes behind the two provisions. Section 6 standards, they urge, serve two purposes: (1) to improve safety in the workplace by removing specific and already-identified hazards; and (2) to provide objective criteria capable of immediate application. Section 8 regulations, they urge, are designed, not for the elimination of specific and already-identified haz-

ards, but for such purposes as the facilitation of investigation and enforcement. The states place principal reliance, in this regard, upon *Louisiana Chemical Association v. Bingham*, 657 F.2d 777, 782-83 (5th Cir.1981), in which the court classified the agency's Records Access rule as a section 8 regulation. The court in *Louisiana Chemical Association* held that before proceeding to the merits of a section 6(f) petition for review it must determine "whether the challenged rule reasonably purports to correct a particular 'significant risk' or instead is merely an enforcement or detection procedure designed to further the goals of the Act generally." *Id.* at 782. It concluded that the Records Access rule was a section 8 regulation.

The quoted distinction provides a convenient test for identifying standards, which this rule satisfies. While both the Records Access rule and the Hazards Communication rule have in common the object of communicating hazard information to employees, the former only provides for access to records maintained by an employer for other purposes, while the latter is aimed at eliminating the specific hazard that employees handling hazardous substances will be more likely to suffer impairment to their health if they are ignorant of the contents of those substances. The Secretary found that inadequate communication is itself a hazard, which the standard can eliminate or mitigate. 48 Fed.Reg. 53321 (1983). *See also* 48 Fed.Reg. 53282-83, 53323-24, 53327-29 (1983).

The State of New York urges that a communication rule can never be a standard, because it does not provide for dimunition of risk through improved protection or reduced exposure. The Secretary found, however, that risk of harm can be greatly reduced by direct warning to employees, who are in the best position to assure that dangerous substances are handled in the safest possible manner. 47 Fed.Reg. 12112. Moreover New York's in-

terpretation of section 6 is inconsistent with the inclusion therein of the direction to the Secretary to promulgate standards which "prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed. . . ." 29 U.S.C. § 655(b)(1) (1982). Finally, while we exercise independent judgment as to the distinction between a section 6 standard and a section 8 regulation, the interpretation of those provisions of the OSH Act by the agency charged with its implementation should be afforded some degree of deference. The Secretary has classified the rule as a standard, and urges that the petition for review is properly here.

We conclude, therefore, that the Hazard Communication Standard is a section 6 standard reviewable in this court pursuant to section 6(f).

III.

Premption of State Hazard Communication Rules in the Manufacturing Sector

Our analysis of the jurisdictional issue disposes of the states' objection to preemption of their hazard disclosure laws with respect to employees in the manufacturing sector. The Hazard Communication Standard, to the extent it is valid, as a section 6 standard, applies to the exclusion of state disclosure laws which have not been approved in accordance with section 18.

Massachusetts, Illinois, New Mexico, and West Virginia raise the question whether the federal Hazard Communication Standard operates to preclude state laws outside the manufacturing sector. The Secretary does not contend that the Standard has such an effect. 48 Fed.Reg. 53284; Respondent's Brief at 84-89. He urges, as well, that the issue of the standard's operation outside that sector is not ripe for review. To the extent

that the states seek a declaration that their hazard disclosure laws may operate outside the manufacturing sector, we agree that it would be premature to make such a declaration in this case. The Secretary does not urge that they may not so operate, but other parties not before us might present reasons, such as unseverability as a matter of state law, which have not been litigated before this court. We hold only that, to the extent it is valid, the federal Hazard Communication Standard preempts state hazard disclosure laws with respect to disclosure to employees in the manufacturing sector.

IV.

Challenges to Validity of the Standard

A. Scope of Review

Petitioners' challenges to the validity of the standard present three issues: (1) its limited application to the manufacturing sector; (2) the failure to adopt as a list of hazardous substances the Registry of Toxic Effects of Chemical Substances (RTECS) compiled by NIOSH; and (3) the inclusion of the trade secret exemption. We consider the validity of those aspects of the rule under the hybrid review scheme of section 6(f), which refers us to substantial evidence in the rulemaking proceeding. We first interpreted section 6(f) in *Synthetic Organic Chemical Manufacturers Association v. Brennan*, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, 420 U.S. 973, 95 S.Ct. 1396, 43 L.Ed.2d 653 (1975). We noted that section 6(e) of the OSH Act requires that whenever the Secretary promulgates a standard he must publish a statement of the reasons for that action in the Federal Register. *Id.* at 1159-60. We held that these published reasons are subject to judicial review, and that they must be consistent with the language and purpose of the OSH Act. We held, further, that judicial review of a standard involves at least five steps:

(1) determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the action taken;

(2) determining whether the Secretary's promulgation adequately sets forth reasons for his action;

(3) determining whether the statement of reasons reflects consideration of factors relevant under the statute;

(4) determining whether presently available alternatives were at least considered; and

(5) if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.

Id. at 1160. This approach to judicial review under section 6(f) has since been consistently followed. *See, e.g., American Iron and Steel Institute v. Occupational Safety and Health Administration*, 577 F.2d 825, 830-31 (3d Cir.1978), *cert. granted*, 448 U.S. 909, 100 S.Ct. 3054, 65 L.E.2d 1139 (1980); *cert. dismissed*, 448 U.S. 917, 101 S.Ct. 38, 65 L.Ed.2d 1180 (1980); *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety and Health Review Commission*, 534 F.2d 541, 551 (3d Cir.1976); *AFL-CIO v. Brennan*, 530 F.2d 109, 114 (3d Cir.1975). Moreover we have held that "in a § 6(f) proceeding the Secretary has an affirmative burden to demostrate the reasonableness of an adopted standard." *Atlantic & Gulf Stevedores*, 534 F.2d at 551.

In this case no petitioner or intervenor questions the adequacy of the Secretary's notice of proposed rulemaking. Our review, therefore, involves the other four *Synthetic Organic* factors.

B. Limitation of Coverage to the Manufacturing Sector

None of the petitioners still before us contend that the manufacturing sector should not be covered by a hazard communication standard. The Secretary's decision to provide coverage only for employees in the manufacturing sector is based on a finding that this sector, which includes 32% of total employment, accounts for more than 50% of the reported cases of illness due to chemical exposure. 48 Fed. Reg. 53285 (1983). From this datum the Secretary determined that employees in the manufacturing sector have the greatest risk of experiencing health effects due to chemical exposure. *Id.* Agricultural employees have a higher chemical source incidence rate than manufacturing employees. The Secretary discounted this datum, however, because 80% of the reported chemical source cases among agricultural workers involved skin illnesses from handling plants, which would not be regulated by the proposed Hazard Communication Standard. *Id.* Moreover the Secretary concluded that the Environmental Protection Administration has, under the Federal Insecticide, Fungicide and Rodenticide Act, exercised jurisdiction over regulation of field use of pesticides. Excluding agricultural employees, there is substantial evidence in the record that the manufacturing sector has the highest incidence rate of chemical exposures which the Agency has authority to regulate.

Several petitioners, while conceding that the finding about incidence rate of illnesses in the manufacturing sector is supported by substantial evidence, contend that the Secretary's exclusion of other sectors, such as service, construction, and agriculture, is unsupported by reasons that are consistent with the purposes of the statute. They urge that while the incidence rate for employees in the manufacturing sector is high overall, some employees in specific non-manufacturing categories, such as hospital workers, are exposed to a greater number of toxic sub-

stances than are typical workers in the manufacturing sector. Moreover some workers in specific non-covered industries have higher reported rates of chemical source illness and injury than do workers in many covered industries. The Standard Industrial Classification breakdown, they contend, is not relevant to the statute, since that classification is made for a myriad of statistical purposes, mainly economic, having little to do with exposure to hazards. The result of the standard is that spray painters in the manufacturing sector, for example, must be provided with MSDS's and with information and training on hazardous chemicals in the products they use, while spray painters in the construction industry using the same products are not so protected.

In explaining the limited coverage, the Secretary reasoned:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need.

45 Fed.Reg. 53286. Rejecting arguments of participants in the rulemaking proceeding that other workers, such as painters in the construction industry, are exposed to the same hazards as are workers in the manufacturing sector, the Secretary reasoned:

> As stated previously, OSHA acknowledges that exposures to hazardous chemicals are occurring in other industries as well. A limited coverage of them is included in the final standard since all containers leaving the workplace of chemical manufacturers, importers, or distributors will be labeled, regardless of their intended destination. This will alert downstream users to the presence of hazardous chem-

> icals, and the availability of material safety data sheets. The Agency contends that the focus of this standard should remain on the manufacturing sector since that is where the greatest number of chemical source injuries and illnesses are occurring. This focus will also serve to ensure that hazard information is being generated for chemicals produced or imported into this country, and this increased availability will benefit all industry sectors.

Id. The Secretary's reasoning does not address the petitioners' contention that reliance on the Standard Industrial Classification is inappropriate because it ignores the high level of exposure in specific job settings outside the manufacturing sector.

The Secretary maintains that section 6(g) of the Act affords him unreviewable discretion to determine what industries shall be covered by a standard. That section provides in relevant part:

> In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments.

29 U.S.C. § 655(g) (1982). We reject the Secretary's contention that his priority-setting authority under section 6(g) vitiates judicial review of his determination that only the manufacturing industry need be covered by the Hazard Communication Standard. Section 6(g) must be read in conjunction with section 6(f), which provides for judicial review of standards. Indeed the language "due regard to the urgency of the need for mandatory safety standards for particular industries" suggests to us a statutory standard by which to measure

the exercise of the Secretary's priority-setting discretion.[2] In *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1309-10 (D.C.Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981), the court reviewed under section 6(f) the Secretary's decision to exempt the construction industry from a standard limiting exposure to lead. Although the court did not explicitly address section 6(g), it implicitly rejected the contention that the Secretary's priority-setting authority is unreviewable. We do so explicitly.

Our difficulty with the Secretary's reliance on section 6(g) arises from the Secretary's failure to explain why coverage of workers outside the manufacturing sector would have seriously impeded the rule-making process. Section 6(g) clearly permits the Secretary to set priorities for the use of the agency's resources, and to promulgate standards sequentially. Once a standard has been promulgated, however, the Secretary may exclude a particular industry only if he informs the reviewing court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards. *See United Steelworkers*, 647 F.2d at 1309-10. The explanation for the Secretary's action quoted above is deficient in the latter respect. Thus the Secretary has failed to carry the burden of persuading us that section 6(g) justifies limitation of coverage to the manufacturing sector.

We are also unpersuaded by the Secretary's contention that the communication rule will "trickle down" to uncovered workers because containers will be labeled. Section 6(b)(5) requires that:

> The Secretary, in promulgating standards dealing with toxic materials or other harmful physical agents

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[2] The Secretary urges that *Public Citizen Health Research Group v. Marshall*, 485 F. Supp. 845 (D.D.C. 1980) supports his interpretation of section 6(g). If it does, we decline to follow it.

> . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

29 U.S.C. § 655(b)(5) (1982). There is record evidence that workers in sectors other than manufacturing are exposed to the hazards associated with use of toxic materials or other harmful physical agents. The Secretary has given no statement of reasons why it would be given the same MSDS's and training as must be given to workers in the manufacturing sector. Section 6(c)(7) provides that:

> Any standard . . . shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(c)(7) (1981): The Secretary has given reasons why the labeling, MSDS, and instructions requirements comply with section 6(c)(7) for employees in the manufacturing sector, but no explanation why the same information is not needed for workers in other sectors exposed to industrial hazards. Such a statement of reasons is required by section 6(f). *Synthetic Organic*, 503 F.2d at 1160.

We hold, therefore, that the petitions for review of those petitioners who object to the limitation of the Hazard Communication Standard must be granted. That standard may continue to operate in the manufacturing sector, but the Secretary's explanation for excluding other sectors does not withstand the scrutiny mandated by

section 6(f). Thus the Secretary will be directed to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible. 29 U.S.C. § 655(b)(5).

C. Failure to Incorporate the RTECS Hazard List

While the Hazard Communication Standard includes several lists of substances which chemical manufacturers and importers must treat as hazardous, the Standard places primary responsibility for determining which products are hazardous on the chemical manufacturer or importer. 29 C.F.R. § 1910.1200(d)(1) (1984). Petitioner Public Citizen urges that the Secretary should have adopted the RTECS list compiled by NIOSH. The agency found that the hazard determination procedure provided the most protective coverage possible by establishing standards to guide manufacturers in determining whether a substance is hazardous. 48 Fed.Reg. 53299. It rejected use of the RTECS list, finding that it was overinclusive because it encompasses "potential" as well as "indentifiable" hazards, *id.* at 53298, and that it was underinclusive because no one list can remain suitably up-to-date, *id.* at 53296. These findings are supported by the Introduction to the RTECS list in which the editor explains that "[t]he absence of a substance from the Registry does not imply that the substance is non-toxic, and thus non-hazardous, any more than the presence of a substance in the Registry indicates that the substance is hazardous in common use." NIOSH, Registry of Toxic Effects of Chemical Substances (RTECS) Introduction xi (July 1984). Indeed the editor notes that the RTECS list includes substances that are common in everyday life and in nearly every household. *Id.* at x.

The Public Citizen contends that OSHA's determination that the RTECS list is inappropriate is belied by the Agency's use of that list in its Records Access rule, *see*

Louisiana Chemical Association v. Bingham, 657 F.2d 777, 783 & n. 10 (5th Cir. 1981). The Records Access rule, which merely requires that employers make available those records which are kept anyway, imposes a much lighter burden on employers than the Hazard Communication Standard. Because the purposes and requirements of the two rules are not identical, it was reasonable for the Secretary to conclude that the hazard determination procedure for each rule need not be identical. We conclude that the Secretary's rejection of the RTECS list as overinclusive is supoprted by substantial evidence and is consistent with the OSH Act's statutory purposes.

D. The Trade Secret Exemption

Several petitioners challenge the inclusion in the Hazard Communication Standard of a "trade secret" exception. 29 C.F.R. § 1910.1200(i) (1984). They contend that the agency has defined "trade secret" too broadly, and that the conditions under which workers may obtain information claimed to be a trade secret are unduly burdensome.

1. The Defintion of Trade Secret

Trade secret protection may arise from two sources: state law or a federal statute. *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, ——, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 815 (1984); *Chevron Chemical Co. v. Costle*, 641 F.2d 104, 115 (3d Cir.), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981). The CSH Act does not create substantive trade secret protection. It deals with that subject in section 15, which provides:

> All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceding under this chapter which contains or which might reveal a trade secret referred to in section 1905 of Title 18 shall be considered confidential for the purpose of that section,

> except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceding under this chapter. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

29 U.S.C. § 664 (1982). The cross-reference to the Trade Secrets Act, 18 U.S.C. § 1905 (1982) confirms that Congress intended section 15 to protect against agency disclosure or misuse of data submitted to it under an expectation that the agency would treat that data at a trade secret to the extent that applicable state law did so. *See Ruckelshaus v. Monsanto, supra,* —— U.S. at ——, 104 S.Ct. at 2876. Section 15 cannot be read as authorizing the creation of trade secret protection going beyond that afforded under state law. Moreover that section deals only with what the agency and its employees may disclose, not with what disclosures the agency may compel in the interest of safety in the workplace.

The Secretary contends that while section 15 deals with disclosures by the agency and its employees, it embodies a recognition by Congress of the significance in the economy of state law trade secret protection, and that it was quite appropriate, in drafting the Hazard Communication Standard, to balance that recognition against the competing congressional concern over safety in the workplace. *See* 48 Fed.Reg. 53312 (1983). Aside from section 15, however, the Secretary points to no provision in the OSH Act authorizing such balancing. Indeed trade secret protection is not even mentioned in section 6, which directs that "[t]he Secretary . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . . ." 29 U.S.C. § 655(b)(5). The quoted provision indicates that Congress struck a balance in favor of safety

in the workplace at the expense of competing interests. In a slightly different context, the Supreme Court held that in section 6(b)(5), "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 509, 101 S.Ct. 2478, 2490, 69 L.Ed.2d 185 (1981).

The Secretary originally proposed that while traditional trade secrets such as chemical formula and process information could be withheld, chemical identity information must be disclosed. 46 Fed.Reg. at 4426 (1981). When representatives of the chemical industry commented on the importance of trade secrets to the economic health of that industry, *see* 48 Fed.Reg. 53312-14 (1983), the Secretary adopted an entirely new approach. First, it defined a trade secret as:

> [A]ny confidential formula, pattern, process, devise, information or compilation of information (including chemical name or other unique chemical identifier) that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

29 C.F.R. § 1910.1200(c) (1984). The Secretary contends that this definition was adopted from section 757 of the Restatement of Torts, 48 Fed.Reg. 53314. In fact, however, inclusion of the parenthetical "(including chemical name or other unique chemical identifier)" not found in section 757, enlarges considerably the Restatement definition. The Secretary's comments indicate that the definition provides trade secret protection for chemical identity which is determinable by reverse engineering. *Id.* This type of information has not traditionally been afforded trade secret protection under state law. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476, 94

S.Ct. 1879, 1883, 40 L.Ed.2d 315 (1974). The Restatement provides that information that may be properly acquired or duplicated without great difficulty should not be considered a trade secret Restatement of Torts, § 757, comment b. The Secretary justified the enlargement of the Restatement definition, reasoning:

> Many products can be reverse engineered if sophisticated analytical techniques are applied, yet cannot be if less advanced technology is used. The determination of what is "practical" in terms of reverse engineering capability rests with this degree of analysis, rather than with a definitive finding of "ability" to be reverse engineered or not. Furthermore, the definition of a trade secret says that the competitor or potential competitor does not know *or* use the information. Thus, even though a competitor could theoretically "reverse engineer" and discover the components of a product, if this information is not in fact used, it remains a *bona fide* trade secret.

48 Fed.Reg. 53314 (emphasis in original). Plainly the Secretary has provided greater protection for chemical manufacturers and importers than that afforded in those states utilizing the Restatement of Torts trade secret definition. Even the Restatement definition, moreover, goes beyond the protection afforded to trade secrets in other regulatory contexts. *See Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1287 (D.C.Cir. 1983) (Food and Drug Administration's adoption of Restatement of Torts trade secret definition inconsistent with Freedom of Information Act).

Section 15 deals only with disclosure by the agency or its employees, and section 6(b)(5) does not permit the Secretary to balance employee safety against competing economic concerns. No other statutory provision has been called to our attention which would justify enlarging

trade secret protection beyond that afforded by state law. Indeed it sems plain that state law cannot prevent the implementation of section 6 safety standards that are otherwise feasible. It appears that the unarticulated premise of the Secretary's concern about protecting trade secrets is that they may be constitutionally protected from the regulatory process. In *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission*, 555 F.2d 82, 95 (3d Cir. 1977), we rejected a constitutional challenge to rules requiring disclosure of proprietary information as a condition to licensing. The *Westinghouse* holding is supoprted by the Supreme Court's holding in *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, ——, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984), that a trade secret voluntarily disclosed to the E.P.A. in exchange for a registration to sell pesticides is not protected if the owner had notice at the time of disclosure that the E.P.A. was authorized to use all data submitted. These cases suggest that a regulation requiring the disclosure even of formula or process information as a precondition for the sale of hazardous products for use in the workplace would be valid. *See* McGarity and Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 Harv.L.Rev. 837, 864-67 (1980). None of the petitioners urge that the Secretary should have required disclosure to that extent. They do contend, however, that the OSH Act does not authorize the Secretary to promulgate a regulation granting more protection to information claimed to be confidential than is afforded by state law.

We agree that there is no legal justification for affording broader trade secret protection in the Hazard Communication Standard than state law affords. No petitioner urges that the Secretary's original proposal, which would have protected formula and process information but required disclosure of hazardous ingredients, is inadequate. That proposal was consistent with "[t]he general policy

of OSHA . . . that the interests of employee safety and health are best served by full disclosure of chemical identity information." 48 Fed.Reg. 53312 (1983). The petition for review will therefore be granted and the proceedings remanded to the Secretary for reconsideration of the definition of trade secrets, which definition shall not include chemical identity information that is readily discoverable through reverse engineering.

2. The Access Rule

In addition to objections to the definition of trade secrets, several petitioners challenge the provisions of the Hazard Communication Standard relating to access to the allegedly confidential information. The petitioners contend that once a manufacturer raises a claim of trade secret, the Standard places overly stringent procedurel barriers to the discovery of information relevant to the assessment of health hazards. These objections go to: a) the requirement that the request be in writing with a statement of need; b) the limitation of access to "health professionals"; and c) the requirement that a confidentiality agreement with a liquidated damages clause be signed. 29 C.F.R. § 1910.1200(i).

a) The Written Request Requirement

The Secretary justifies the requirement that a request for trade secret information be in writing with supporting documentation as a means of facilitating dispute resolution:

> Then if the matter is to be referred to OSHA to settle any dispute between the requesting party and the employer protecting a trade secret, the Agency will be able to base a decision upon a review of these written materials. Should the matter not be resolved to the satisfaction of all parties, it may result in a citation and referral to the Occupational Safety

and Health Review Commission (OSHRC) for judicial review.

48 Fed.Reg. at 53315. The tendered justification is both reasonable and consistent with the purposes of the Act.

b) The Restriction of Access to Health Professionals

The restriction limiting access to trade secrets to health professionals is more troublesome. Commentators on the proposed standard were generally in agreement that trade secret chemical identity information must be disclosed at least to a treating physician. *Id.* at 53316. The Secretary concluded that other health professionals, particularly those engaged in the prevention of disease or injury, had a legitimate need for chemical identity information. *Id.* at 53318. It declined, however, to authorize direct employee access to specific chemical identities of hazardous substances for which a trade secret is claimed. *Id.* The Secretary advances three rationales to justify restricting employee access to secret chemical identity information.

On reason is that "by and large professional training would be required" for any purpose that would amount to a "need to know" confidential information. *Id.* The United Steelworkers of America, AFL-CIO-CLC, a petitioner, points to a number of instances in the record, however, where non-health-professional workers used chemical identity information to improve workplace safety. They urge that employees and local union safety officers, although not health professionals, have often received training in health and safety, and thus know how to use the basic literature on chemical hazards, and know how to obtain technical assistance. Steelworkers' brief at 40.

A second reason advanced by the Secretary for allowing access only to health professionals, and not directly to employees, is that "providing access to trade secret chemical identities only to health professionals on a confiden-

tial basis will protect these employees adequately." 48 Fed.Reg. at 53318. The Steelworkers point to record evidence, however, that is quite difficult for many workers to obtain the services of a health professional, at least prior to the need for treatment. Steelworkers' brief at 41-42. There is no substantial evidence in the record that significant numbers of unorganized workers will be able to obtain the services of a health professional prior to the time that treatment becomes necessary. Even for organized workers, the record evidence suggests that few local unions retain health professionals.

The Secretary's final justification for limiting access to health professionals involves the risk of disclosure.

> This is not to say thet "downstream" employees are more likely to disclose trade secrets or violate confidentiality agreements than health professionals, but it is an unmistakable fact that the more people who have access to confidential information, the more difficult it is to preserve its secrecy or to locate the source of a leak if one occurs.

48 Fed.Reg. at 53318. The Secretary correctly notes that the chance of a leak increases as the number of people having access to information increases. The issue posed by the petitioners, however, is not the number of persons obtaining access, but the type of persons. There is no record evidence supporting the Secretary's apparent conclusion that employees who are not health professionals will be more likely to breach a confidentiality agreement than would the same number of health professionals. We conclude that the restriction in the Hazard Communication Standard of access to trade secret information to health professionals is not supported by substantial evidence in the record, and is inconsistent with the mandate of section 6(b)(5) that OSHA promulgate the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee

will suffer material impairment of health. . . ." 29 U.S.C. § 655(b)(5).

c) The Confidentiality Agreement Requirement

The standard requires that, except in a medical emergency, a manufacturer which receives a request for trade secret information may require that the requester sign a confidentiality agreement containing a liquidated damages clause. 29 C.F.R. § 1910.1200(i)(3)(v) (1984). The Standard minimizes the risk that employers will make excessive demands for liquidated damages clauses by providing that the agreement "[m]ay not include requirements for the posting of a penalty bond," but only "a reasonable pre-estimate of likely damages. . . ." 29 C.F.R. § 1910.1200(i)(4)(ii) and (iii) (1984). Some petitioners contend that the requirement of a confidentiality agreement will deter health professionals from lending assistance. In Part IV(D)(2)(b) above we hold that the restriction on access to health professionals is invalid. But in any event, confidentiality agreements are a well-accepted traditional means of allowing access to trade secret information while effectively protecting the owners of that information from irreparable harm. Thus we reject petitioners' challenge to the Standard's requirement that requesters of trade secret information sign a confidentiality agreement.

V.

Conclusion

The petitions for review are properly filed in this court. The Hazard Communication Standard, to the extent that it is valid, preempts state hazard communication rules as they apply to employees in the manufacturing sector. The Standard may operate in that sector, but the Secretary will be directed to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such appli-

cation would not be feasible. The Secretary's ejection of the RTECS list as overinclusive is supported by substantial evidence, consistent with the OSH Act's statutory purpose and is therefore valid. The definition of trade secrets, which is broader than the protection afforded trade secrets by state law, is invalid, and the Secretary will be directed to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering. The trade secret access rule in the Standard is invalid insofar as it limits access to health professionals, but is otherwise valid, and the Secretary will be directed to adopt a rule permitting access by employees and their collective bargaining representatives.

JAMES McGIRR KELLY, District Judge, concurring and dissenting:

Although I concur with the majority's disposition of most of the issues in this case, I am unable to agree with the majority's position that restricting access to trade secret information to only health care professionals is inconsistent with the requirements of Section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), and is not supported by substantial evidence in the record.

Section 6(b)(5) states in pertinent part:

> (5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which *most adequately assures, to the extent feasible, on the basis of the best available evidence*, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. . . .

29 U.S.C. § 655(b)(5) (emphasis added).

There is no meaningful reason why every employee or his or her agent should be granted the right to obtain trade secret information. The majority, in overruling the Secretary's restriction which requires that trade secret information only be given to health care professionals, opens the door allowing every person in the work place the right to obtain trade secret information if the person signs a confidentiality statement. The majority holds that restricting trade secret information to the health care profession does not meet the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . . ." 29 U.S.C. § 655 (b)(5). I am not in accord with the majority's position which rejected the Secretary's viewpoint, which is that the health care professions can most adequately and professionally advise workers who may be exposed to hazardous chemicals. I see little, if any, benefit to allow any worker or his agent to obtain such confidential information. Moreover, I find that Section 15 of OSH Act, 29 U.S.C. § 664 is a guidepost to caution the Secretary not only when he or she seeks confidential information for any proceeding under the OSH Act, but also when he or she enacts standards to effectuate the intentions of Congress.

Indeed, Congress has made the Secretary a quasifiduciary for owners of trade secrets in that the Secretary, in exercising his or her powers, must be mindful of the interests the possessors of trade secrets have.

Accordingly, I respectfully dissent on this issue. In all other respects I concur with the majority opinion.

APPENDIX E

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New York, the State of New Jersey, the State of Connecticut, and National Paint & Coatings Association, *Intervenors.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, American Petroleum Institute & Atlantic Richfield Company, and National Paint & Coatings Association, *Intervenors.*

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, National Paint & Coatings Association, American Petroleum Institute & Atlantic Richfield Company,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, United States Department of Labor,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR and John Donovan, Secretary of the United States Department of Labor,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent.

Argued March 23, 1987

Decided May 29, 1987

Before GIBBONS, Chief Judge, and FISHER, Chief Judge* and KELLY, District Judge**.

OPINION OF THE COURT

GIBBONS, Chief Judge.

United Steelworkers of America and Public Citizen, Inc., *et al.*, petitioners in the petition for review which this court granted in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985), now move to enforce that judgment. The respondent to the present motion, John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor, has been substituted for Thorne G. Auchter, his predecessor, as a party in this action. Petitioners contend that the Secretary has not complied with our judgment. In *United Steelworkers*, we held that the Hazard Communication Standard, promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L.No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982)), is valid and may be applied in the manufacturing sector, but we directed the Secretary "to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such application would not be feasible." 763 F.2d at 743. The Secretary contends that he has fully complied with that judgment, which was formally issued on July 8, 1985. He maintains this contention despite the fact that no final

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

position with respect to the application of the hazard communication standard outside the manufacturing sector has been taken, and the fact that there is not intention to take such a position until "early 1988". We conclude that the Secretary has not acted in compliance with this court's judgment and has withheld or unreasonably delayed agency action, and that further relief is necessary.

I.

In 1970, Congress enacted the OSH Act and directed the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the OSH Act—that is, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §§ 651(b), 655(b)(1). Section 6(b)(7) of the OSH Act explicitly requires that

> [a]ny standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(b)(7). Section 7(b) of the OSH Act, as amended, provides that "[a]n advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 655 of this title." 29 U.S.C. § 656(b). A Standards Advisory Committee on Hazardous Materials Labeling (Advisory Committee) was established in 1974 and was charged with

> develop[ing] guidelines for categorizing and ranking hazards of materials, and guidelines for prescribing the required warnings of such hazards and related information on symptomatology, protective steps and equipment, and safe handling procedures, by such

means as labels, data sheets, and training requirements.

Report of the Standards Advisory Committee on Hazardous Materials Labeling dated June 6, 1975 at iv. The Advisory Committee was directed to submit within 270 days a report to the Secretary in a form from which regulations could be fashioned. *Id.* at iv, 26. The Advisory Committee submitted its report on June 6, 1975, recommending what it described as a "total system" approach to hazard communication, which included the preparation of Material Safety Data Sheets (MSDSs), labeling, and employee training programs. *See id.* at 4-5. The report, like the OSH Act, referred to all workers, making no distinction among employees in different sectors of the economy. Although the Advisory Committee Report was received by the Secretary in June, 1975, no notice of proposed rulemaking on hazard communication was published for some time. On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed.Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous materials labeling." *Id.* at 5,373. Among the topics on which comments were requested was "[s]upported cost data of the estimated costs of coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendations, was addressed to all employers, not only to employers in the manufacturing sector.

On January 16, 1981, more than ten years after the enactment of section 6(b)(7) of the OSH Act, more than

five years after the Secretary received the Advisory Committee Report, and almost four years after the June 28, 1977 advance notice of proposed rulemaking, the Secretary issued a notice of proposed rulemaking on hazard identification. *See* 46 Fed.Reg. 4,412 (1981). This notice specified that comments had to be received on or before April 18, 1981, and that hearings would be held at five places between May 26, 1981 and September 1, 1981. The proposed hazard communication standard was to be applicable to employers in Division D (manufacturing), major groups 20-39 in the most recent revision of the Standard Industrial Classification Manual published by the Office of Management and Budget (the manufacturing sector). *Id.* at 4,426. The notice further provided:

> Although evidence is presently lacking, the need for the protections of the hazards identification standard may well be as great in some industries excluded from coverage as they are in those covered. Accordingly, OSHA invites comment on the appropriate scope of coverage. Employers currently excluded from the scope of the proposal may be included in the scope of the final standard if evidence in the record ultimately warrants such inclusion. They and others interested in this issue are therefore given notice that they should be prepared to participate in the rulemaking and provide justification, if they so desire, of why particular classes of employers should or should not be excluded.

Id. Thus, the 1981 notice of rulemaking gave notice that employers outside the manufacturing sector should comment and provide information at the scheduled hearings as to why their employees should or should not be excluded.

The 1981 notice of proposed rulemaking was withdrawn, however, on February 12, 1981 for further consideration of regulatory alternatives. *See* 46 Fed.Reg.

12,214 (1981). The notice of withdrawal did not suggest any change in the scope of coverage of any new proposal. Over a year later, a new notice of a proposed hazard communication rule and of public hearing on the proposal was published. *See* 47 Fed.Reg. 12,092 (1982). Like its February 12, 1981 predecessor, the 1982 notice referred to the 1975 Advisory Committee Report. *See id.* Like the 1981 proposed standard, the 1982 proposed standard was also to be applicable to employers in the manufacturing sector. The notice provided, however:

> Although non-manufacturing employers are not covered by the proposal, it is expected that their employees will also benefit from it to a great extent since employees in the manufacturing sectors will be required to send the hazard-related information downstream to their customers. Once finalized and implemented, its effectiveness in triggering downstream transmittal could be assessed, and determinations made as to the type of hazard communication standard that may be effective and beneficial for other industries, such as construction or agriculture. If necessary, the proposal could be extended or modified for these other industries at a later date.
>
> Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.

Id. at 12,101-02. Thus, as in the 1981 notice of rulemaking, employers outside the manufacturing sector were given notice that the hazard communication standard might be applied to them, and were invited to comment.

On November 25, 1983, almost thirteen years after section 6(b)(7) was enacted, and over seven years after the Secretary received the Advisory Committee Report, a final hazard communication standard was published. *See* 48 Fed.Reg. 53,280 (1983) (codified at 29 C.F.R. § 1910-

.1200 (1986)). Consistent with the Advisory Committee recommendation, it places primary responsibility for the identification of hazardous substances on their manufacturers and importers, requiring them to prepare MSDSs and to place hazard communication information on labels. *See United Steelworkers v. Auchter*, 763 F.2d at 732-33. It also requires that covered employers make the MSDSs available for employee inspection, 29 C.F.R. § 1910.1200 (g)(8) (1986), and "provide employees with information and training on hazardous chemicals in their work area . . .," 29 C.F.R. § 1910.1200(h) (1986). The final rule protects only employees in the manufacturing sector. Since all chemical manufacturers are in that sector, however, the only significance of limiting the rule to the manufacturing sector is with respect to the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training. All employees outside the manufacturing sector are downstream from those upon whom the labeling and identification obligations are imposed. As the standard currently reads, it does not require producers or intermediate suppliers of hazardous substances to provide either MSDSs or properly labeled containers to users in industries outside the manufacturing sector. Both producers and intermediate suppliers must, however, transmit MSDSs and labeled containers to manufacturing sector employers. In addressing the burden of this requirement on intermediate suppliers, OSHA noted that "[t]he additional costs . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed.Reg. at 53,331.

In justifying the narrow scope of the final rule, the Secretary explained:

> Although hazardous chemicals are used in other industries as well, OSHA determined that the employees in the manufacturing sector are at the greatest

> risk of experiencing health effects from exposure to hazardous chemicals. The Agency thus decided to exercise its authority to set priorities for standards for promulgation under Section 6(g) of the Act, and limited the proposed standard's scope of the manufacturing sector.

48 Fed.Reg. 53,284 (1983). The Secretary explained, further:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need.

Id. at 53,286.

II.

In the prior case, the petitioners here, among others, petitioned this court for review of the final standard. They challenged the limited scope of the hazard communication standard, contending that it should not have been limited to the manufacturing sector. Petitioners argued that the exclusion of non-manufacturing industries, many of which have a high incidence of chemical injuries and illnesses, was not supported by the rulemaking record and contravened the purposes of the OSH Act. *See* 763 F.2d at 737.

On the other hand, the Secretary defended the limited scope of the standard solely on the ground that, under 29 U.S.C. § 655(g), he had unreviewable discretion to establish rulemaking practices and chose to address the sector with the most serious problems first. In *United Steelworkers*, we expressly rejected the Secretary's position, holding that he had no discretion to "exclude a particular industry [unless] he informs the reviewing

court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. That holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees. Our prior decision is unequivocal:

> We hold, therefore, that the petitions for review of those petitioners who object to the limitation of the Hazard Communication Standard must be granted. . . . Thus the Secretary will be directed to reconsider the application of the standard to employees in other sectors *and to order its application to other sectors unless he can state reasons why such application would not be feasible.* 29 U.S.C. § 655(b)(5).

763 F.2d at 739 (emphasis added). Moreover, our July 8, 1985 judgment is equally unequivocal. The Secretary was directed "to reconsider its application in other sectors *and to order its application in those sectors unless he can state reasons why such application would not be feasible.*" *United Steelworkers v. Auchter*, Nos. 83-3554, 83-3561, 83-3565, 84-3066, 84-3093, 84-3128 (3d Cir. July 8, 1985) (Judgment) (emphasis added). It cannot be seriously contended that that direction permitted the Secretary to do anything other than consider, on the basis of the rulemaking record which we had before us in 1985, the issue of feasibility of communication of hazard information to employees in the non-manufacturing sectors.

III.

Despite the language of our opinion and for our judgment, on November 27, 1985 the Secretary issued an advanced notice of proposed rulemaking, claiming that

the record was insufficient on the issue of the feasibility of expanding the applicability of the standard. The 1985 notice solicited comment on present hazard communication practices in sectors other than manufacturing and on the likely economic impact of extending the hazard communication standard to fifty non-manufacturing industry groups.[1] *See* 50 Fed.Reg. 48,794 (1985). The notice fixed a ninety-day period for comments. It posed nine groups of questions seeking information about the industries not covered by the rule,[2] and three groups of

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[1] In contrast with his position with respect to hazard communication in non-manufacturing sectors, the Secretary apparently had no difficulty in complying with that part of our judgment directing him "to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering" and "to adopt a rule permitting access [to trade secret information] by employees and their collective bargaining representatives." 763 F.2d at 743. The Secretary, without further rulemaking, promptly issued an interim final rule complying with these directions. *See* 50 Fed. Reg. 48,750 (1985).

[2] The questions asked about uncovered industries are:

1. Please indicate the industry or industries to which the information supplied applies (by SIC Code if possible).

2. What is the current industry practice regarding hazard communications? Do employers generally have written hazard communication programs? Are containers labeled? Are material safety data sheets available for the hazardous chemicals? Are employees trained regarding the hazards and appropriate precautionary measures?

3. What are the costs associated with the aspects of hazard communication that are currently implemented in the industry? Please indicate by specific activity if possible, i.e., costs for training, labels, etc. Based on the present provisions of the Hazard Communication Standard, what additional costs are estimated to be incurred if the standard were extended to your industry?

4. If OSHA extended the provisions of the Hazard Communication Standard to this industry as written, what problems might arise in obtaining or transmitting hazard information? (For example, are there special problems associated with the agricultural industry or small businesses?) What solutions to

questions about possible modifications of the standard as written. We conclude that this further inquiry was unnecessary.

Some of the questions could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident. For example, the Secretary asked "Are containers labeled? Are material safety data sheets available for the hazardous chemicals?" The standard already in place when these questions were posed required that the chemical manufacturer or importer label containers and prepare ma-

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these problems can you suggest that would still result in employees getting the information they need?

5. Does this industry have fixed work sites? If not, is there some central point where information could be made accessible?

6. Does this industry have transient workers? What current practices are used to ensure such workers are apprised of the hazards they may encounter on the site? Is there training or information specific to the types of jobs performed?

7. To what extent are hazardous chemicals purchased from retail distributors? How is information obtained about these chemicals when purchased from these types of establishments? Do the retail distributors provide hazard information? Are manufacturers contacted directly for the information? If so, has this been a successful approach? Are employees exposed to the chemical involved without receiving information about the specific hazards? How is a determination made regarding the appropriate protective measures to be implemented in this situation?

8. Are "consumer products" used in this industry in a manner that results in different exposure levels than would be encountered in consumer usage? What types of products are these? How is hazard information obtained for these products?

9. Is this industry subject to state-initiated "right-to-know" laws? What has been the industry's experience under such state laws? Are there particular provisions that have been difficult to implement in this industry? If so, what alternative provisions are suggested to ensure employees received the necessary information? To what extent is the industry complying with the state laws?

50 Fed. Reg. at 48,795.

terial safety data sheets. The Secretary also asked, "Does [the] industry have fixed work sites?", knowing full well that the construction industry does not. The Secretary asked "Does [the]industry have transient workers?", knowing full well that the agricultural industry does.

Moreover, most of the remaining detailed questions could have been equally applicable to manufacturing sector employers. Yet the Secretary had not found it necessary to ask them of those employers in the June 28, 1977 advance notice of proposed rulemaking, 42 Fed.Reg. 5,372, in the January 16, 1981 notice of proposed rulemaking, 46 Fed.Reg. 4,412, or in the March 19, 1982 notice of proposed rulemaking, 47 Fed.Reg. 12,092. Nevertheless, the Secretary was able to determine that the hazard communication standard could feasibly be applied in the manufacturing sector. In addition, as noted in Part I above, the 1977 and 1981 notices requested comment from employers in the non-manufacturing sectors and gave notice that the rule might be extended to them. Finally, even today the Secretary, responding to petitioners' motion, does not point to any information received as a result of the November 27, 1975 notice of rulemaking which was not either known or readily ascertainable prior to our last decision. Although the comment period specified in the November 27, 1985 notice expired on February 25, 1986, we have been given no plausible explanation for the delay in formulating a rule between then and now, or for further proposed delay until early 1988.

We hold the Secretary is not in compliance with our previous judgment. As he well understood with respect to the trade secrets issues, that judgment did not contemplate going back to square one. It contemplated action by the Agency on the record which we reviewed. That record was developed after notice to all interested parties that they should furnish "cost data of the estimated costs of coming into compliance with the recom-

mendations of the advisory committee." 42 Fed.Reg. at 5,373. The hazard communication standard adopts essentially the same scheme as the Advisory Committee proposed. The 1977 notice was not limited to the manufacturing sector. Although subsequent notices proposed such limited application, they put interested parties on notice that the application might be broader and invited comment in light of that possibility. The final standard included importers and distributors who had previously been excluded from coverage. *See* 48 Fed.Reg. at 53,331.

An agency may adopt a scope which is "different—even substantially different—from the proposed rule" without engaging in a whole new round of notice and comment. *See American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) (*citing International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C.Cir.1973)). *See also United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C.Cir.), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981). Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed.Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption.

The Secretary, relying on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), contends that he should be free to discharge the task of implementing section 6 of the OSH Act at a pace selected in his discretion. *Vermont Yankee* is not relevant, however, for the case is before us at an entirely different stage. Our prior decision con-

sidered rulemaking after full rulemaking procedures had taken place. Moreover, we are not dealing with the modification of a standard based on considerations arising after promulgation of an initial standard. Thus, the Secretary's *Vermont Yankee* argument is no more than an effort to relitigate the contention, explicitly rejected in *United Steelworkers of America v. Auchter*, 763 F.2d at 738, that his priority-setting authority permits him, without explanation, to exclude categories of workers from a duly promulgated standard.

IV.

Sixteen years after Congress directed the Secretary to "prescribe the use of labels or other appropriate forms of warnings as are necessary to insure that employees are apprised of all hazards to which they are exposed", 29 U.S.C. § 655(b)(7), no standard has been promulgated covering approximately two thirds of all workers covered by the OSH Act. This court is empowered by the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1982). Moreover, we may issue "all writs necessary or appropriate in aid of" our jurisdiction. 28 U.S.C. § 165(a) (1982). Thus, we can issue orders necessary or appropriate to the enforcement of our prior judgment. Exercising the powers conferred by both statutes, we will direct that the Secretary shall, within sixty days of the date of our order,[3] publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers. Because our prior judgment did not include a specific time limit we will deny, at this time, the petitioners' motion to hold the respondents in contempt.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

No. 87-1582

ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents

And consolidated cases

[Filed May 20, 1988]

BEFORE: Wald, Chief Judge; Sentelle, Circuit Judge

ORDER

Upon consideration of the union intervenors' motion to transfer proceedings to the Third Circuit, oppositions filed thereto and intervenors' reply, and the Associated Builders and Contractors, Inc. and the construction industry intervenors' motion for emergency stay of OSHA's revised Hazard Communication Standard, oppositions and responses filed thereto and petitioner and intervenors' reply, it is

ORDERED by the court that these consolidated proceedings be transferred to the United States Court of

Appeals for the Third Circuit pursuant to 28 U.S.C. § 2112(a). The revised Hazard Communication Standard was promulgated in response to orders by the Third Circuit in *United Steelworkers v. Auchter*, 763 F.2d 728 (3d Cir. 1985), and *United Steelworkers v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987), and petitioners have raised issues similar to those already considered by that court. *See American Public Gas Ass'n v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976) (per curiam). It is

FURTHER ORDERED that an administrative stay of the revised hazard communication standard be granted until the Third Circuit rules on the emergency motion for stay.

Per Curiam

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3345/46/47/48 #D-82

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*

vs.

WILLIAM E. BROCK, ETC., *et al.*

(Complete captions attached)

Present: BECKER, HUTCHINSON, and COWEN, *Circuit Judges.*

Certified copy of District of Columbia Circuit Order filed 5-20-88 transferring cases to Third Circuit and granting stay of revised Hazard Communication Standard until Third Circuit rules on Motion for Stay

Emergency Motion by Petitioner in No. 88-3345, Associated Builders and Contractors, Inc. *and* Construction Industry Intervenors for Stay of Osha's revised Hazard Communication Standard (See 1 of 7)

Motion by Petitioner in No. 88-3348, United Technologies Corporation, for leave to file a Motion for Partial Summary Reversal, (See 1 of 10) *and*

Motion for Summary Reversal of Portions of Respondent's revised Hazard Comm. Standard (See 2 of 10)

Motion by United Technologies Corp. for leave to file reply to Building and Construction Trade Dept. Re-

sponse to Motion for Summary Reversal (See 3 of 10), Reply attached

/s/ Arpi D. Longacre
Deputy Clerk 7-5019

ORDER

The foregoing Motion for stay is granted. The Clerk shall expedite the appeal to the next available list. The motion for leave to file a Motion for Partial Summary Reversal is denied.

By the Court,

/s/ Samuel R. Becker
Circuit Judge

Dated: Jun. 24, 1988

adl/cc: TJW BH SCY DCV
MLF GHC VLB WSR
MWO MB AHF

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345/46/47/48

(See #D-82)

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*

vs.

WILLIAM E. BROCK, ETC., *et al.*

(Complete captions attached)

Present: BECKER, HUTCHINSON, and COWEN, *Circuit Judges.*

Motion by respondent, Secretary of Labor, for clarification of stay order

Copy of Court Order dated 6-24-88 sent for Court's information

/s/ Lauria LoPresti
Deputy Clerk 7-3080

ORDER

The foregoing Motion is granted. The order entered on June 24, 1988 is clarified to make clear that the stay applies only with respect to construction employees in the non-manufacturing sector.

By the Court,

/s/ Samuel R. Becker
Circuit Judge

Dated: July 8, 1988

LLcc: MB AHF DCV
MWO SJM SCY
WSR NIS AER
VLB BHH
EIL TJW
GHC MLF

APPENDIX I

29 C.F.R. Chapter XVII—Occupational Safety and Health Administration, Department of Labor

Part 1926 SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Subpart C General Safety and Health Provisions

§ 1926.21 Safety training and education.

(b) *Employer responsibility.* (1) The employer should avail himself of the safety and health training programs the Secretary provides.

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the reglations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

(3) Employees required to handle or use poisons, caustics, and other harmful substances shall be instructed regarding the safe handling and use, and be made aware of the potential hazards, personal hygiene, and personal protective measures required.

(4) In job site areas where harmful plants or animals are present, employees who may be exposed shall be instructed regarding the potential hazards, and how to avoid injury, and the first aid procedures to be used in the event of injury.

(5) Employees required to handle or use flammable liquids, gases, or toxic materials shall be instructed in the safe handling and use of these materials and made aware of the specific requirements contained in subparts D, F, and other applicable subparts of this part.

(6) (i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be

taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

(ii) For purposes of paragraph (b)(6)(i) of this section, "confined or enclosed space" means any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to, storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs, vaults, and vessels.

Supreme Court, U.S.
FILED
APR 3
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1070, 88-1075 and 88-1385

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor provided adequate notice to non-manufacturers that the hazard communication standard might be extended to them.

2. Whether the Secretary properly extended the hazard communication standard, which initially applied only to the manufacturing sector, to non-manufacturing sectors based on a general finding that the standard is reasonably necessary and appropriate to remedy a significant risk of material harm in those sectors, rather than on industry-specific findings.

3. Whether the Secretary properly determined that extension of the hazard communication standard to the non-manufacturing sectors was technologically and economically feasible.

4. Whether the Secretary's incorporation into the hazard communication standard of a list of hazardous chemicals developed by a private professional and scientific organization (the American Conference of Governmental Industrial Hygienists) constituted an unlawful delegation of rulemaking authority.

5. Whether the court of appeals erred in invalidating the Office of Management and Budget's disapproval, pursuant to the Paperwork Reduction Act of 1980, of certain provisions of the hazard communication standard.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1070

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

No. 88-1385

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated*

Builders) is reported at 862 F.2d 63 (88-1070 Pet. App. 1a-15a; 88-1075 Pet. App. 1a-15a; 88-1385 Pet. App. 1a-15a). The opinion of the court of appeals in *United Steelworkers of America* v. *Pendergrass* (*USWA III*) is reported at 855 F.2d 108 (88-1070 Pet. App. 54a-68a; 88-1075 Pet. App. 24a-37a).

JURISDICTION

The court of appeals entered its judgment in *Associated Builders* on November 25, 1988 (88-1070 Pet. App. 19a-21a; 88-1075 Pet. App. 20a-23a; 88-1385 Pet. App. 19a-21a). The court of appeals entered its judgment in *USWA III* on August 19, 1988, and it denied the government's petition for rehearing on November 28, 1988 (88-1075 Pet. App. 38a-39a). Associated General Contractors, Associated Builders and Contractors, and the National Grain and Feed Association (together with United Technologies Corporation) filed petitions for a writ of certiorari on December 23, 1988, December 28, 1988, and February 21, 1989, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. In 1983, the Secretary of Labor published a final occupational hazard communication standard designed to address comprehensively "the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector" (29 C.F.R. 1910.1200(a)(2) (1984)). See 48 Fed. Reg. 53,280 (1983). The Secretary explained that she was limiting the standard's coverage to the manufacturing sector based on her determination "to first regulate those industries with the greatest demonstrated need" (*id.* at 53,286). On judicial review, the court of appeals held that the limitation to the manufacturing sector was unsupported and directed the Secretary:

> to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

United Steelworkers of America v. *Auchter* (*USWA I*), 763 F.2d 728, 736-738, 739 (3d Cir. 1985).

The Secretary thereupon commenced a new rulemaking proceeding and solicited comments on the extension of the hazard communication standard to the non-manufacturing sector. See 50 Fed. Reg. 48,794 (1985). Certain parties to the *USWA I* litigation objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the existing record and directed, under threat of contempt sanctions, that the Secretary:

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987). Although the federal government disagreed with that ruling, the Solicitor General determined, after rehearing was denied, not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the

non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852 (1987).[1] The Office of Management and Budget (OMB) reviewed the standard pursuant to its authority under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* It disapproved three particular provisions and instructed the Secretary "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (52 Fed. Reg. 46,075, 46,076, 46,079 (1987)).[2]

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[1] Broadly speaking, the standard requires chemical manufacturers and importers to develop hazard information, label their chemical containers, and send material safety data sheets (MSDSs) to downstream manufacturing and non-manufacturing customers (29 C.F.R. 1900.1200(d), (f), (g)). The standard defines the chemical hazards that are covered and sets forth criteria the chemical manufacturers and importers must follow in making hazard determinations; it also incorporates several recognized lists of hazardous chemicals, inclusion on which automatically requires treatment of the chemical as hazardous for purposes of hazard communication (29 C.F.R. 1910.1200(c), (d), and Apps. A-C). Furthermore, the standard requires manufacturing and non-manufacturing employers (1) to prepare a written hazard communication program that describes the employer's general compliance plan and contains a list of the hazardous chemicals used in the workplace; (2) to ensure that labels remain affixed on the containers, and that when hazardous chemicals are transferred to new containers, those containers are also labelled properly; and (3) to maintain the MSDSs and make them readily accessible to employees in their work areas (29 C.F.R. 1910.1200(e), (f), (g)). In addition, employers must provide information and training to their employees with respect to the requirements of the standard and the chemical hazards present in the workplace (29 C.F.R. 1910.1200(h)).

[2] Specifically, OMB disapproved (1) "the requirement that [MSDSs] be provided on multi-employer worksites" through either the exchange of MSDSs among employers or their maintenance at a central location at the worksite; (2) "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" that is in the same form and concentration as a consumer product, regardless of

2. The revised standard gave rise to two distinct legal challenges. In the first challenge, organizations representing employee interests in *USWA I* and *USWA II* argued that the Secretary was in contempt of the earlier orders when she acceded to OMB's review and disapproval of portions of the standard. More fundamentally, they argued that OMB lacked authority under the Paperwork Reduction Act to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while disagreeing that the Secretary was in contempt, agreed with the attack on OMB's authority and invalidated its disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America* v. *Pendergrass* (*USWA III*), 855 F.2d 108 (3d Cir. 1988); 88-1075 Pet. App. 24a-37a.

In the second challenge, brought pursuant to 29 U.S.C. 655(f), organizations representing certain non-manufacturing employers argued that the Secretary improperly extended the hazard communication standard to the non-manufacturing sectors. The court of appeals disagreed with that contention and affirmed the validity of the standard. *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated Builders*), 862 F.2d 63 (3d Cir. 1988); 88-1075 Pet. App. 1a-15a. The court concluded that its previous decisions in *USWA I* and *USWA II* largely controlled the outcome of the employer challenge (*id.* at 7a). The court rejected, both as a matter of precedent and on the merits, the employers' argument that the Secretary had failed to provide adequate notice to the non-manufacturing sectors that the agency's final standard

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how the product is used; and (3) "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), (e)(2)(i).

might apply to them (*id.* at 10a-11a). It also reiterated its prior holding in *USWA I* that the Secretary had adequately made a general significant risk finding applicable to all workers exposed to hazardous chemicals, and held that the Secretary was not required to make specific findings of significant risk for each affected industry and substance (*id.* at 11a-13a). The court further concluded that the Secretary's feasibility determination was supported by substantial evidence, observing that the main components of the standard applicable to non-manufacturers—training and the maintenance of labels and data sheets—do not even approach the limits of feasibility (*id.* at 13a-14a).

In addition, the court ruled that the Secretary did not unlawfully delegate her rulemaking authority to a private organization (the American Conference of Governmental Industrial Hygienists (ACGIH)) when she incorporated that organization's list of hazardous chemicals into the standard (88-1075 Pet. App. 14a-15a). The court held that the validity of the Secretary's reliance on ACGIH—an "impartial scientific organization"—necessarily followed from its determination in *USWA I* that OSHA was not itself required to evaluate specific chemical hazards, but could impose that duty on the chemical manufacturers (*id.* at 15a). Moreover, the court concluded that adopting the ACGIH list as a floor of covered substances was fully consistent with the OSH Act, which directs OSHA to base its toxic substance standards on the "best available evidence" with due consideration to "the latest available scientific data" (*ibid.*). See 29 U.S.C. 655(b)(5).

ARGUMENT

1. Given the decisions in *USWA I* and *USWA II*, which are now final, the decision of the court of appeals in *Associated Builders* is correct. In any event, that decision

does not present any significant or recurring issues of law, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of that decision is not warranted.

a. Petitioners ABC and NGFA contend (88-1075 Pet. 11-14; 88-1385 Pet. 23-26) that they received inadequate notice because the Secretary issued the revised hazard communication standard without first issuing a proposed rule applicable to non-manufacturers. This contention overlooks the fact that, as the court of appeals exhaustively detailed in *USWA II* and reiterated in the opinion below (88-1075 Pet. App. 10a), "the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding." In 1977, the Secretary issued an Advance Notice of Proposed Rulemaking that was not limited to the manufacturing sector, but invited all "interested persons" to submit information concerning the need for a hazard communication standard. 42 Fed. Reg. 5372, 5373; *USWA II*, 819 F.2d at 1265. This was followed by the 1982 notice of proposed rulemaking which "was at least as explicit." 88-1075 Pet. App. 11a. While proposing to cover only the manufacturing sector, "[t]hat notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included." *Ibid.*; *USWA II*, 819 F.2d at 1266; 47 Fed. Reg. 12,092, 12,101-12,102.[3]

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[3] An earlier 1981 notice of proposed rulemaking, which was subsequently withdrawn for consideration of regulatory alternatives, similarly focused on the manufacturing sector while inviting comment "on the appropriate scope of coverage." 46 Fed. Reg. 4412, 4426; *USWA II*, 819 F.2d at 1265-1266.

Indeed, the court of appeals' remand in *USWA I* was based on that court's conclusion that the Secretary had already provided adequate notice to the non-manufacturing sectors. See *USWA II*, 819 F.2d at 1269. The court concluded that since "what was at issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees," no further evidentiary inquiry was necessary and that the original rulemaking record was adequate for purposes of the remand. *Id.* at 1267; see also *id.* at 1269 (the Secretary could "easily determine []" from the original record the non-manufacturing sectors' ability to comply with the standard); 48 Fed. Reg. 53,280, 53,286 (1983 final rule) (noting comments suggesting "that the scope [of the standard] should be expanded to cover all industries where employees are exposed to hazardous chemicals").

Petitioners' contention that the Secretary's failure to repromulgate a proposed rule for the non-manufacturing sectors violated Section 6(b)(2) of the OSH Act, 29 U.S.C. 655(b)(2), therefore lacks merit, because the earlier notices were legally "sufficient to alert all employers" to the scope issue and the ensuing revised final standard was a "logical outgrowth" of the proposals and the rulemaking that followed. 88-1075 Pet. App. 11a. See also *USWA III*, 88-1075 Pet. App. 36a; *USWA II*, 819 F.2d at 1269; *Action Alliance of Senior Citizens* v. *Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. The court of appeals correctly held, both as a matter of circuit precedent and on the merits, that the Secretary had provided adequate notice to all employers. See *United Steelworkers of America* v. *Marshall*, 647 F.2d

1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S 913 (1981).[4]

Petitioners additionally argue (88-1070 Pet. 24-25; 88-1075 Pet. 13 n.5; 88-1385 Pet. 24-25) that, regardless of whether OSHA had provided legal notice to all employers, the court erred in cutting off the Secretary's additional round of notice and comment. This argument is unavailing. In *USWA II*, the Secretary defended her post-remand decision to conduct further rulemaking proceedings as well within her administrative discretion. The Secretary believed it would be useful to develop the record on feasibility in the non-manufacturing sectors, which,

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[4] As the court elsewhere held, the holding that the Secretary provided adequate notice also pertains to the several modifications to substantive aspects of the standard that were made in the revised standard: "The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed." *USWA III*, 88-1075 Pet. App. 36a, quoted in *Associated Builders*, 88-1075 Pet. App. 9a. This is certainly true of the change in the definition of "chemical manufacturer," 29 C.F.R. 1910.1200(c), to which petitioner NGFA objects (88-1385 Pet. 25-26 n.18). In keeping with the general broadening of the scope of the standard, this term was redefined solely by eliminating the reference to SIC Codes 20-39 (the manufacturing sector). In almost all cases, the change is purely technical and does not affect the assignment of responsibility for the development of hazard information; it does, however, capture the relatively unusual circumstance (as in the case of grain elevators) where a "chemical" is "produced" (*i.e.*, "manufacture[d], processe[d], formulate[d] or repackage[d]" by an employer outside of SIC Codes 20-39. 29 C.F.R. 1910.1200(c). Moreover, contrary to NGFA's suggestion (88-1385 Pet. 26 n.18), there is nothing incongruous about including grain dust in a hazard communication standard applicable to chemicals; the fact that grain is a food obviously does not mean that its dust is harmless to workers exposed to it in the workplace. See *National Grain & Feed Ass'n* v. *OSHA*, 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

despite the notice given to all employers, was relatively sparse in the original proceeding. When the court nonetheless held that the existing record was adequate to make the feasibility determination and that any further fact-gathering constituted undue delay and must cease, the Secretary sought rehearing en banc. The Secretary argued that the court's order imposed unwarranted limitations on the Secretary's administrative discretion and that a supplemental notice-and-comment rulemaking would, by enhancing the evidentiary record, make an extended standard more fully supportable. Once the court failed to grant rehearing, however, the government decided against seeking certiorari in the belief that further proceedings were not essential, and that the court's action, though unwarranted, would not be fatal to a revised rule. The Secretary's belief proved to be correct: the court below held that, on the basis of the existing record, she made a rational and defensible decision to extend the hazard communication standard to the non-manufacturing sectors.

There is no basis for revisiting now the question of whether the court should have permitted the Secretary the opportunity to complete her supplemental fact-gathering. The Secretary complied fully with the court's order when she issued the revised standard, and that standard must be judged solely on the basis of whether it is supported by substantial evidence in the record under review. It is irrelevant at this point that the Secretary might have developed a more extensive record if she had been permitted to do so.[5]

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[5] Petitioner AGC (88-1070 Pet. 27-28; cf. 88-1075 Pet. 13-14) additionally complains that the court below deprived the parties of meaningful judicial review by holding that certain issues, specifically those relating to the notice and significant risk requirements, had previously

b. Petitioners challenge (88-1070 Pet. 16-19; 88-1075 Pet. 14-16; 88-1385 Pet. 27-28) the court's holding (88-1075 Pet. App. 11a-13a) that the Secretary validly based the revised standard on a general finding of significant risk. The assertion that this holding is in error or in conflict with prior decisions of this Court and other courts of appeals does not withstand scrutiny.

As the court noted (88-1075 Pet. App. 12a, citing *USWA I*, 763 F.2d at 738), the Secretary's significant risk

been decided in *USWA I* or *USWA II* and were consequently binding on the parties. 88-1075 Pet. App. 10a-11a; see also *id.* at 15a. According to AGC (Pet. 27), this application of stare decisis undermined traditional standing principles because petitioners, who were not covered under the original standard, could not previously have challenged it in the court of appeals. See 29 U.S.C. 655(f). The implication, AGC warns (88-1070 Pet. 27), is that "[t]o preserve their right to challenge these findings * * * petitioners would have had to intervene in the proceedings brought to challenge OSHA's decision not to regulate outside the manufacturing sector." But the court of appeals also made alternative holdings that, aside from stare decisis, it independently believed that the Secretary had met the relevant notice and significant risk requirements. 88-1075 Pet. App. 10a-11a. Furthermore, it is clear that the principle of stare decisis, as codified in Third Circuit Internal Operating Procedure 8C, applies regardless of whether the parties in this case participated in the earlier proceeding. The court's invocation of this principle was unexceptional, and, consistent with IOP 8C, if petitioners thought that de novo review was merited notwithstanding the circuit precedent, they should have sought rehearing en banc.

In any event, there is nothing ominous about the result predicted by petitioners. The rules on intervention permit non-parties the opportunity to protect their interests in ongoing litigation; and there is no incompatibility between saying petitioners had no standing to challenge the original standard and saying they could have intervened as respondents to defend the Secretary's decision to limit its scope. Moreover, it is noteworthy that AGC does not assert that the Secretary inadequately represented its interest on this point in *USWA I* and *II*. It is also noteworthy that petitioners successfully intervened in *USWA III*.

finding in the original rulemaking "applied to all workers who would be exposed to hazardous chemicals." See also *USWA I*, 763 F.2d at 738 (noting record evidence that employees in sectors other than manufacturing are also exposed to hazardous chemicals and are in need of hazard information). In particular, the Secretary made an across-the-board determination that "inadequate communication about serious chemical hazards endangers workers," that "the standard will increase employee awareness of the potential health and safety risks associated with industrial chemicals[,] should result in increased [employee] use of personal protective devices, improved work practices, and other precautionary measures [, and] * * * should result in more safety-enhancing investments" by employers due to their increased knowledge about safety and health hazards, and that consequently the standard can be expected to yield a long-term significant reduction in chemical-source illnesses and injuries. 48 Fed. Reg. 53,280, 53,321, 53,328-53,329 (1983). Thus, the Secretary did "not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards." *USWA II*, 819 F.2d at 1267 (quoting 48 Fed. Reg. 53,286 (1983)). Although the Secretary initially chose to limit the scope of the standard to the manufacturing sector,[6] it was precisely the in-

[6] In *USWA I*, the court stated that Section 6(g) of the OSH Act, 29 U.S.C. 655(g), while permitting the Secretary "to set priorities for the use of the agency's resources and to promulgate standards sequentially," could not be used to justify limiting the standard to the manufacturing sector where the Secretary had failed to explain "not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. AGC (88-1070 Pet. 25-26) urges this Court to grant review on this question of the Secretary's priority-setting discretion. The govern-

congruity between her general risk findings and the standard's limited scope that prompted the court to confine its remand to the feasibility of the standard, as opposed to its need, in the non-manufacturing sectors. 88-1075 Pet. App. 12a; *USWA II*, 819 F.2d at 1267, 1270; *USWA I*, 763 F.2d at 737, 739.[7]

Moreover, in the course of making her post-remand feasibility determination, the Secretary "accumulated evidence to indicate that some employees in every SIC code designation are exposed to hazardous chemicals." 52 Fed. Reg. 31,852, 31,858 (1987); compare 48 Fed. Reg. 53,280, 53,284-53,286 (1983). She specifically referred to record evidence on the need for the standard for supermarket workers, hospital workers, barbers and beauticians, longshore workers, utility workers, dry cleaning and laundry workers, and farmworkers. 52 Fed. Reg. 31,852, 31,857 (1987). She also emphasized the long history of consultation with the OSHA Advisory Committee on Construction Safety and Health, which has repeatedly recommended a hazard communication standard for construction workers and estimated that 70% of all construction workers are exposed to chemical hazards. *Id.* at 31,857-31,858, 31,871 (Table 2; SIC codes 15-17).

The court of appeals was thus correct to conclude that the Secretary's significant risk determination met the threshold requirement for the issuance of an OSHA stand-

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ment, however, did not seek certiorari on this ruling and believes that the Secretary's subsequent extension of the standard to cover all employers has mooted the issue.

[7] See 50 Fed. Reg. 48,794, 48,795 (1985) ("the need for the standard has already been demonstrated, and the information required at this point is to establish the current status of hazard communication within the industries outside manufacturing, and the appropriateness of covering those industries in a manner similar to the coverage of manufacturing in the current rule").

ard. The purpose of the rulemaking was to develop a generic hazard communication standard. The Secretary's focus was therefore appropriately on whether the general failure of chemical manufacturers to disseminate adequate information about hazardous chemicals and of employers to provide their employees with such information posed a significant occupational safety and health risk and on whether OSHA could significantly reduce this risk through the development of appropriate standards. Having found, as a general matter, that a uniform hazard communication standard was necessary to remedy this universal problem (see, *e.g.*, 52 Fed. Reg. 31,850, 31,859 (1987) (discussing need for a single standard), 48 Fed. Reg. 53,280, 53,323-53,324 (1983) (discussing market failure)), the Secretary was under no further obligation to repeat her risk analysis for each of the 70 two-digit SIC codes that encompass the entire spectrum of economic activities in the private sector. Indeed, as the court below accurately concluded, "[a] requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible." 88-1075 Pet. App. 13a.[8]

Accordingly, contrary to petitioners' contentions (88-1070 Pet. 18; 88-1075 Pet. 14, 16; 88-1385 Pet. 27-28), the decision below is not at all in conflict with *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607

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[8] In issuing the standard, the Secretary estimated that there were as many as 575,000 hazardous chemical products, with thousands more introduced every year. 48 Fed. Reg. 53,280, 53,323 (1983).

(1980) (plurality opinion), in which the significant risk requirement under the OSH Act was first discussed. As this Court there explained, Section 3(8) of the OSH Act, 29 U.S.C. 652(8), requires the Secretary to find that a standard is reasonably necessary and appropriate to remedy significant workplace risks. 448 U.S. at 639. Nothing in that decision suggests, however, that a standard aimed at risks common to all industries is invalid unless the Secretary has first established the significance of the risk and the efficacy of the required practices in each and every one of the affected sectors. On the contrary, the Court emphasized that the Secretary, who retains the discretion to define the acceptable level of risk, "has no duty to calculate the exact probability of harm" and "is free to use conservative assumptions in interpreting the data * * *, risking error on the side of overprotection rather than underprotection." 448 U.S. at 655-656. Significantly, the Court also noted that the Secretary may impose certain "information-gathering" requirements below the level of risk needed to establish a permissible exposure limit for a specific toxic substance as a means of protecting unusually susceptible individuals or determining whether lower limits should be set. *Id.* at 658 & n.66. See also *id.* at 662-664 (Burger, C.J., concurring) (the Secretary has substantial discretion in making significant risk determinations). The lower court's recognition (88-1075 Pet. App. 13a) that a "general finding [of significant risk] concerning all potentially covered industries" must of necessity be sufficient to support a "performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries" therefore is fully consistent with *Industrial Union Department.*[9]

[9] Petitioners also err in asserting (88-1075 Pet. 14; 88-1385 Pet. 27) that the decision below conflicts with *American Textile Mfrs. Inst.* v.

Petitioners' contention (88-1070 Pet. 16-18; 88-1075 Pet. 15; 88-1385 Pet. 27-28) that this Court's review is warranted because the decision below conflicts with decisions of the Fourth, Fifth and District of Columbia Circuits dealing with the significant risk requirement also misses the mark. In *Texas Indep. Ginners Ass'n* v. *Marshall,* 630 F.2d 398, 406-409 (1980), the Fifth Circuit struck down the Secretary's standard for the cotton ginning industry in part for failure to make an adequate significant risk finding.[10] There, the Secretary had determined that a different standard than the one she had issued for the rest of the cotton industry was necessary to protect cotton gin workers, but she had not supported this determination with substantial evidence of significant risk at the much lower exposure levels and in the less harmful working conditions that are prevalent in the domestic cotton ginning industry. Here, by contrast, the Secretary recognizes the need for a uniform hazard communication standard to cover all industries because lack of information about a hazardous chemical poses a significant risk to a worker regardless of the exact conditions of use and because the chemical manufacturers, who must bear the primary responsibility for providing hazard information, generally distribute the chemicals in a single stream of commerce.

Donovan, 452 U.S. 490, 536-540 (1981). The Court there invalidated a portion of the OSHA cotton dust standard because the Secretary had included a wage guarantee requirement for reasons of general fairness unrelated to safety and health; the Court nowhere held that the OSH Act requires a separate significant risk justification for each provision of a standard when the goal to advance occupational safety and health is not in doubt.

[10] The Fifth Circuit's independent holding that the standard was invalid because the Secretary failed to perform cost-benefit analysis was discredited by this Court in *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. 490, 510-511 n.30 (1981).

See 52 Fed. Reg. 31,852, 31,859, 31,864 (1987); 48 Fed. Reg. 53,280, 53,295-53,296 (1983). Moreover, *Texas Independent Ginners* involved a standard setting, *inter alia*, specific control requirements. There is a fundamental distinction between that kind of standard and a performance-oriented, informational standard such as hazard communication. See 88-1075 Pet. App. 13a; *Louisiana Chemical Ass'n* v. *Bingham*, 550 F. Supp. 1136, 1146 (W.D. La. 1982), aff'd per curiam, 731 F.2d 280 (5th Cir. 1984); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549, 580 (1979).

The other two cases relied on by petitioners are simply inapposite. In *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1454-1455 (1985) (en banc), the Fourth Circuit ruled that the Secretary acted within her discretion when she included the tree care industry within the general hearing conservation standard, even though that industry purportedly has many of the same characteristics as the oil and gas drilling industry, which the Secretary had decided to exclude from the general standard and to cover in a separate comprehensive standard. And in *United Steelworkers of America* v. *Marshall*, 647 F.2d at 1309-1310, the D.C. Circuit upheld the Secretary's exclusion of the construction industry from the lead standard on grounds of feasibility, not significant risk.

In sum, nothing in these cases stands for a general legal principle that the Secretary must separately assess the risk in every industry to be covered by a single standard once the Secretary has determined that they all share a common significant risk or that the Secretary is required under the "reasonably necessary and appropriate" language of Section 3(8) to subject each facet of such a standard to

industry-by-industry risk analysis. See 88-1070 Pet. 21-23; 88-1075 Pet. 14-15; 88-1385 Pet. 28.[11]

c. Petitioners' argument (88-1070 Pet. 19-21; 88-1075 Pet. 16-18; 88-1385 Pet. 28-29) that the court improperly shifted the Secretary's burden of proving the technological and economic feasibility of the standard is also erroneous. Under the statute, the Secretary must issue toxic substance standards that "to the extent feasible" assure that no worker is subject to material harm resulting from hazardous working conditions. 29 U.S.C. 655(b)(5). The Secretary's burden is therefore to establish, by substantial evidence, that the standard does not exceed the limits of technological or economic feasibility. *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. at 508-509, 513 n.31. The court of appeals' observation that the rulemaking record "contained no credible evidence that the standard would be technologically or economically infeasible" (88-1075 Pet. App. 14a) in the non-manufacturing sector

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[11] In any event, there can be no doubt that there is a significant risk in the construction industry, where more than 70% of all employees are exposed to hazardous chemicals. See 52 Fed. Reg. 31,852, 31,871 (1987) (Table 2; SIC codes 15-17). Moreover, contrary to petitioner ABC's argument (88-1075 Pet. 15), this risk is not eliminated by existing OSHA requirements (29 C.F.R. 1926.21) that construction workers be trained in the use of hazardous materials because, absent the hazard communication standard, there is no corresponding obligation for suppliers to provide the necessary hazard information to the contractors and no requirement for the maintenance on site of warning labels and material safety data sheets or for the development of written hazard communication plans. 88-1075 Pet. App. 13a. Likewise, the hazards associated with grain dust are well known and establish the existence of a significant risk in the grain and feed industry warranting its coverage by a hazard communication standard. *Ibid.* See *National Grain & Feed Ass'n* v. *OSHA,* 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

constitutes a finding that the Secretary met that burden here.

Indeed, the Secretary not only concluded that the record contained no "credible evidence indicating the standard would be infeasible for any individual sector"—thereby responding to the exact terms of the remand order in *USWA II*, 819 F.2d at 1270—but she also affirmatively found that "the original record on the whole supports a finding that the performance-oriented [standard] is feasible for all industries." 52 Fed. Reg. 31,852, 31,855 (1987). The Secretary based this finding in part on the fact that feasibility had already been established in the manufacturing sector, in which the chemical manufacturers in particular bear by far the largest compliance burden of any employer group; in part on experience gained under the original standard and in states that had already extended hazard communication requirements to the non-manufacturing sectors; and in part on record evidence from employers and employees in the non-manufacturing sectors indicating that the standard would be practical in their sectors. 52 Fed. Reg. 31,853, 31,855-31,857 (1987). The Secretary found further support for her finding in a post-remand regulatory analysis that quantified the Secretary's cost estimates on an industry-by-industry and establishment-size basis and concluded that the costs for the non-manufacturing sectors (including construction) would fall within the ranges already established and determined to be reasonable for the manufacturing sector. *Id.* at 31,869-31,874; compare 48 Fed. Reg. 53,280, 53,332-53,334 (1983).[12]

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[12] This regulatory analysis, together with other evidence that was accumulated since *USWA I*, filled in the perceived gaps in the original record that the Secretary identified in the rehearing petition following *USWA II*. See 88-1070 Pet. 10-11. Furthermore, the Secretary

Thus, the court of appeals not only applied a correct legal test, but it properly concluded that the standard's requirements "hardly approach the limits of feasibility" and that the Secretary's feasibility determination for the non-manufacturing sectors "is on the agency record completely supportable" (88-1075 Pet. App. 14a). That determination does not warrant further review.

d. Petitioner NGFA additionally contends (88-1385 Pet. 9-19) that the court of appeals erred in upholding the Secretary's reliance on the ACGIH *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment* (latest edition) (TLV list) to provide a mandatory floor of hazardous substances that are automatically covered by the hazard communication standard. The principal argument (88-1385 Pet. 10-14) is that the Secretary is required to make a significant risk determination with respect to each regulated substance, and that the Secretary never made that threshold determination concerning grain dust and other substances included in the TLV list, because that responsibility has been unlawfully delegated to a private organization.

This argument is deeply flawed. Like the significant risk challenge discussed above, NGFA's delegation argument is based on the fundamental misperception that the

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recognized that the issue with respect to the non-manufacturing sectors was largely "the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training." *USWA II*, 819 F.2d at 1266. See also *id.* at 1267; *USWA I*, 763 F.2d at 738-739. The Secretary intentionally designed a performance-oriented standard permitting an individual employer to adopt different cost-effective strategies for meeting the standard's requirements and made several changes in the standard to make it more suitable for non-manufacturing workplaces. 52 Fed. Reg. 31,852, 31,860 (1987); 48 Fed. Reg. 53,280, 53,281-53,282 (1983); 88-1075 Pet. App. 9a, citing *USWA III*, 855 F.2d at 113.

Secretary was under an obligation to determine separately the risk associated with each substance potentially covered by the standard. Rather, the Secretary was required to determine that lack of hazard communication generally posed a significant risk to workers, and that a standard was reasonably necessary and appropriate to reduce the risk. Thus the focus of the rulemaking was appropriately directed toward defining the categories of hazards (not specific chemicals) to be covered by the standard and toward developing a workable methodology for establishing which chemicals would be subject to the standard's hazard communication requirements.

Based on an extensive rulemaking record, the Secretary determined that the most protective hazard communication standard could be achieved only by placing the responsibility for hazard determination on the chemical manufacturers. 48 Fed. Reg. 53,280, 53,286-53,289 (1983); 88-1075 Pet. App. 15a; *USWA I*, 763 F.2d at 739 (upholding OSHA's hazard determination procedure over the suggested alternative of exclusive reliance on government-generated lists of hazardous chemicals). See 29 C.F.R. 1910.1200(c) (definitions of "health hazard" and "physical hazard"), (d) ("hazard determination"), and Appendices A-C.[13] NGFA does not challenge the Secre-

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[13] More specifically, the standard requires each chemical manufacturer or importer to evaluate the hazards of chemicals produced in its workplace or imported by it. 29 C.F.R. 1910.1200(d). The standard sets out the categories of health and physical hazards to be evaluated, provides criteria for evaluating the "available scientific evidence" on each hazard category, and includes a non-mandatory list of references that could aid the hazard determination process. 29 C.F.R. § 1910.1200(c), (d), and Appendices A-C. According to the prescribed criteria, the chemical manufacturer or importer must treat as hazardous—and therefore develop a container label for and MSDS including the relevant hazard information on—any chemical for which

tary's imposition of that duty on the chemical manufacturers. Yet, the Secretary's incorporation of certain mandated lists, including the TLV list, into this requirement was part and parcel of this regulatory decision; having invested the chemical manufacturers with considerable discretion to determine which chemicals are hazardous, she determined the need to limit that discretion by, among other methods, putting an objective "floor" under the hazard determination process. 48 Fed. Reg. 53,280, 53,299, 53,336 (1983).[14]

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there is "at least one positive study conducted in accordance with established scientific principles" finding adverse health effects, as defined by the standard. 29 C.F.R. § 1910.1200(d)(2). In addition, the standard mandates that the chemical manufacturer or importer shall consider to be hazardous any chemical that is included on one of several well-known lists of hazardous chemicals. 29 C.F.R. § 1910.1200(d)(3), (4). One of the prescribed sources of information is the latest edition of the ACGIH TLV list. 29 C.F.R. § 1910.1200(d)(3)(ii).

ACGIH "is an impartial scientific organization which identifies safe exposure levels for various substances." 88-1075 Pet. App. 15a. Its membership is limited to professionals in governmental agencies or educational institutions engaged in occupational safety and health programs. A TLV (threshold limit value) is a recommended airborne concentration and represents conditions under which nearly all workers may be repeatedly exposed daily without adverse effect. ACGIH's TLVs are established by committees of recognized experts who review the available scientific literature. For instance, before adopting a TLV for grain dust, it solicited public comment and relied on 36 scientific studies or reports. ACGIH, *Documentation of the Threshold Limit Values and Biological Exposure Indices* 288-289.2 (5th ed. 1986). The ACGIH TLV list, which currently includes approximately 600 substances, is updated annually.

[14] At bottom, the TLV list simply provides a readily-available source of credible scientific information. For example, NGFA strenuously objects to ACGIH's inclusion of oat, wheat, and barley dust on its TLV list. But as noted *supra* (note 13), ACGIH based its

The inclusion of mandated lists was thus a common sense response to apparent deficiencies in the proposed hazard determination process, which assigned chemical manufacturers the responsibility for making hazard determinations without a corresponding check on their broad discretion. 47 Fed. Reg. 12,092, 12,121, 12,123 (1982 proposal). See 48 Fed. Reg. 53,280, 53,286-53,288 (1983 discussion of rulemaking record). In particular, the Secretary's choice of the TLV list to form a floor under the hazard determination process responded to repeated comments that the list is routinely used by responsible industrial hygienists as an authoritative source of information on well-known hazardous substances. *Ibid.*[15]

The court correctly concluded (88-1075 Pet. App. 15a) that the use of the TLV list in conjunction with the chemical manufacturers' independent duty to research and assess hazards was both "appropriate" and fully consistent

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TLV for grain dust on 36 scientific studies and reports. If only one of these contains "evidence which is statistically significant" and was based on a study "conducted in accordance with established scientific principles," the standard requires grain dust to be treated as a health hazard *regardless* of its status on the TLV list. 29 C.F.R. 1910.1200(d)(2). Moreover, "the propensity of grain elevators to blow up" (88-1075 Pet. App. 13a) makes grain dust, in any event, a "physical hazard" subject to the standard. As a practical matter, therefore, the inclusion in 1986 of oat, wheat, and barley dust on the TLV list did not significantly add to the obligations that employers in the grain industry incurred when the standard was extended to apply to non-manufacturers.

[15] Interested parties, including NGFA, had every opportunity to participate in the rulemaking and to add to the record on appropriate hazard determination methods. Furthermore, Section 6(f) of the OSH Act, 29 U.S.C. 655(f), provided them with the right to seek pre-enforcement judicial review of the Secretary's regulatory decision. There was accordingly no unfairness in the way the Secretary incorporated the TLV list into this standard.

with the Secretary's statutory authority to set standards.[16] The hazard determination scheme, including the incorporation of the mandated lists, was obviously in fulfillment, not derogation, of this mandate.[17]

Furthermore, NGFA clearly misses the mark (88-1385 Pet. 19-22) when it argues that the Secretary somehow crossed the line that demarcates constitutional delegations

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[16] Congress directed the Secretary to achieve the OSH Act's goal of safe and healthful working conditions for all Americans in part by "developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. 651(b)(5). Moreover, Section 6(b)(5), 29 U.S.C. 655(b)(5), which governs the issuance of toxic substance standards, directs the Secretary to base the standards on "the best available evidence" and with due consideration given to "the latest available scientific data"; it also states a preference for standards expressed in terms of "objective criteria and of the performance desired." In addition, Section 6(b)(7), 29 U.S.C. 655(b)(7), prescribes standards for labels and other forms of warning to "insure that employees are apprised of all hazards to which they are exposed." Cf. 29 U.S.C. 657(g)(2) (the Secretary has general authority to "prescribe such rules and regulations as [s]he may deem necessary to carry out [her] responsibilities under this [Act]"); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980).

[17] NGFA argues (88-1385 Pet. 14-18) that Congress could not have intended the Secretary to incorporate the recommended standards of private organizations into Section 6(b) standards because, in Section 6(a), it specifically authorized the adoption, without rulemaking, of previously-established national consensus and federal standards for only the first two years following the effective date of the OSH Act. See 29 U.S.C. 655(a). The fact, however, that Congress, out of concern for procedural fairness to the regulated community, limited the time in which the Secretary was permitted to adopt existing standards as final OSHA standards without full rulemaking does not imply that it similarly prohibited the Secretary from concluding, based on a complete rulemaking record, that the incorporation by reference of particular hazard determinations in a private standard into a comprehensive Section 6(b) standard is reasonably necessary or appropriate.

of rulemaking authority.[18] This Court has long recognized that the legislature—or, as in this case, a standard-setting agency acting pursuant to delegated authority—may seek private assistance in "matters of a more or less technical nature." *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 537 (1935). See *Cospito* v. *Heckler,* 742 F.2d 72, 87-88 n.25 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985). In general, delegations of this sort pass constitutional muster so long as the delegatee provides needed practical expertise, is not likely to exercise its limited authority in a biased or self-aggrandizing manner, and does not replace the governmental entity as the ultimate policymaker regarding the matter being regulated. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398-400 (1940). These criteria are obviously satisfied in this case.[19]

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[18] Significantly, the courts of appeals uniformly have upheld the constitutionality of the Secretary's authority to issue Section 6(a) standards, which, as noted *supra* (note 17), involve the wholesale adoption, without rulemaking, of national consensus standards developed by certain private organizations. *Towne Constr. Co.* v. *OSHRC,* 847 F.2d 1187, 1189 (6th Cir. 1988); *Modern Drop Forge Co.* v. *Secretary of Labor,* 683 F.2d 1105, 1110 (7th Cir. 1982); *Noblecraft Indus., Inc.* v. *Secretary of Labor,* 614 F.2d 199, 203 (9th Cir. 1980). Moreover, many of these Section 6(a) standards themselves incorporate privately established standards by reference. *Towne Constr. Co.,* 847 F.2d at 1189. Cf. *Todd & Co.* v. *SEC,* 557 F.2d 1008, 1012 (3d Cir. 1977) (upholding SEC's reliance on private security dealer association's disciplinary procedures).

[19] The Secretary did not delegate to ACGIH the policy-making role of setting a hazard communication standard or even of devising the requirements for hazard determination; rather, the Secretary simply required the use of ACGIH's existing TLV list, among other specified lists and criteria, as a source of public information in the hazard determination process. Moreover, the Secretary adopted ACGIH's TLV list

2. Petitioner ABC also challenges (88-1075 Pet. 18-19) the court of appeals' decision in *USWA III*, which held that OMB lacked authority under the Paperwork Reduction Act to disapprove certain provisions of the Secretary's hazard communication standard. The Acting Solicitor General has filed a petition for a writ of certiorari challenging that decision as well. See *Dole* v. *United Steelworkers of America,* No. 88-1434 (filed Feb. 27, 1989). We suggest that this Court grant the government's petition, rather than ABC's. First, as ABC seems to recognize (88-1075 Pet. 18-19), the question presented by that case is far more important to the federal government than to any individual litigant. As the government's petition explains in detail, the court of appeals' decision will substantially interfere with OMB's responsibility to review a wide range of federal information collection activities. Second, ABC's petition primarily challenges the *Associated Builders* decision, and provides only a cursory discussion of issues presented by the *USWA III* decision.

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with full knowledge that ACGIH is a well-respected professional organization with specific expertise in the area of hazard determination, that it is not itself a chemical manufacturer with responsibility for hazard determinations under the standard or in an adversarial position vis-à-vis any segment of the regulated community, and that the TLV list historically has been developed based on stringent scientific criteria.

NGFA makes much of the fact (88-1385 Pet. 13, 22) that ACGIH is not bound by the same procedural and substantive limitations that constrain the Secretary in setting OSHA standards. But neither are the chemical manufacturers when they perform hazard determinations, nor, for that matter, are the scientists upon whose studies they must base their evaluations. Quite simply, hazard determination, whether done by ACGIH or a chemical manufacturer, is not the same as standard-setting. Moreover, if the regulated community has a credible basis for objecting to ACGIH's future hazard determinations, it may petition the Secretary for modification of the standard. See 29 U.S.C. 655(b); 29 C.F.R. 1911.3.

And third, ABC, which was an intervenor in *USWA III*, will have a full opportunity to present its views as a respondent to the government's petition. Under these circumstances, we believe that it would be appropriate to deny ABC's petition in full.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *et al.*,
Petitioners,
v.
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,
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v.
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
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THE NATIONAL GRAIN & FEED ASSOCIATION, INC., *et al.*,
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v.
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

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QUESTIONS PRESENTED

The *certiorari* petitions in these cases challenge 7 aspects of OSHA's Hazard Communication Standard and the Third Circuit's decisions reviewing that Standard:

(a) the Third Circuit's factual determination that petitioners received adequate notice that the Hazard Communication Standard might be applied to their industry;

(b) the Third Circuit's statement that petitioners should be foreclosed from raising issues settled in prior litigation in which petitioners could have intervened, where the Third Circuit nevertheless proceeded to consider and reject petitioners' contentions on the merits;

(c) OSHA's factual determinations accepted by the Third Circuit regarding the existence of a "significant risk" in the affected industries;

(d) OSHA's factual determinations accepted by the Third Circuit that compliance with the Standard is feasible for the affected industries;

(e) petitioners' contention that the Standard—whose provisions plainly have a health-protective purpose and are not merely redundant of existing protective requirements—is not "reasonably necessary or appropriate";

(f) the Third Circuit's rulings in two earlier related proceedings that OSHA's original Standard arbitrarily and capriciously failed to cover employees subject to the significant risks the Standard is intended to correct, which petitioners contend constituted improper interference with OSHA's setting of rulemaking priorities;

(g) OSHA's determination, after full rulemaking, that the findings of a private scientific body provide an appropriate base for listing a chemical as a hazardous substance for purposes of the Standard.

The question presented is whether any of these determinations are worthy of this Court's review.

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IN THE

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS - UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1070 ("AGC Pet."), 88-1075 ("ABC Pet.") and 88-1385 ("NGFA/UT Pet."), insofar as those petitions seek review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988) ("*ABC v. Brock*").[1]

STATEMENT

1. The Provisions of the Hazard Communication Standard.

To enable employees to protect themselves from threats to their health, the regulation at issue here—the Hazard Communication Standard ("HCS" or "the Standard") promulgated by the Occupational Safety and Health Administration ("OSHA" or "the Agency")—requires employers to provide employees with basic information concerning hazardous substances found in the workplace, through a combination of methods including labeling, material safety data sheets ("MSDSs") and training.

The lion's share of the responsibilities created by the HCS falls on chemical manufacturers, importers and (to a lesser extent) distributors. The manufacturers and importers have the obligation under the Standard to "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200(d)(1). In addition, manufacturers and importers must treat as "hazardous" chemicals appearing on either of two lists: (1) the list of substances for which OSHA has established exposure limits in the standard

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[1] The petition for certiorari in No. 88-1075 also seeks review of the decision in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) ("*USWA III*"). The position of USWA and BCTD with respect to that decision is set out in their brief in opposition filed this date in *Elizabeth Dole, et al. v. United Steelworkers of America, et al.*, No. 88-1434.

for Air Contaminants that appears at 29 C.F.R. Part 1910, Subpart Z; and (2) the latest edition of *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, which is published and updated annually by the American Conference of Governmental Industrial Hygienists ("ACGIH").[2] 29 C.F.R. § 1910.1200(d)(3). The manufacturers and importers must "obtain or develop a material safety data sheet for each [such] hazardous chemical," § 1910.1200(g)(1), and must "ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment" of a hazardous substance "and with the first shipment after a material safety data sheet is updated," § 1910.1200(g)(6). Chemical manufacturers, importers, and distributors must also "ensure that each container of hazardous chemicals leaving the workplace is labeled" with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

Other employers, including the construction industry petitioners in Nos. 88-1070 and 88-1075, have much less extensive obligations under the HCS; these employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. These employers must: (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8);[3] (2) see to it that containers of hazardous chem-

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[2] ACGIH is a professional society whose membership consists of occupational health professionals who work for governmental agencies and educational institutions. Chemicals appearing on the Threshold Limit Values list are those that ACGIH has determined pose a health risk to employees who are exposed to them above a certain concentration.

[3] Where employees must travel between workplaces during a shift, "the material safety data sheets may be kept at a central location at the primary workplace facility." § 1910.1200(g)(9). At multi-employer workplaces, if the circumstances are such that the employees of one employer may be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter

icals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200 (f)(5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop, implement, and maintain a written hazard communication program that describes how the employer will meet the HCS's requirements as described above, § 1910.1200(e)(1).

2. History of the Regulation.

The rulemaking that culminated in the HCS was initiated by a Notice of Proposed Rulemaking published on March 19, 1982. *See* 47 Fed. Reg. 12092 *et seq.* (1982). In that notice OSHA proposed to limit the scope of the Standard to (i) chemical manufacturers and (ii) employers in the manufacturing sector as defined by Standard Industrial Classification (SIC) Codes 20 through 39. *Id.* at 12092, 12101, 12119. In support of the latter limitation, the Agency stated that "[i]t appears that employees in manufacturing facilities are at the greatest risk of harmful exposure to chemicals." *Id.* at 12101.

However, OSHA's notice made it clear that the question of the scope of the Standard had not been finally resolved, but was a matter to be determined in the rulemaking. Stating that "[*t*]*he scope of the* [*proposed*] *standard could have been* limited only to chemical manufacturers (SIC 28), or could have been *broadened to include all employers in all workplaces*," *id.* at 12101 (emphasis added), OSHA concluded its discussion of this aspect of the proposal with the following words: "*Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.*" *Id.* at 12102 (emphasis added).

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must either provide copies of the MSDSs for such chemicals to the other employer, "or . . . make [them] available at a central location in the workplace." § 1910.1200(e)(2)(i).

In opening the rulemaking hearings, OSHA's Director of Health Standards Programs reiterated that the scope of the Standard was "certainly an open issue," and one on which the Agency "welcome[d] additional comment." [4] He added:

> . . . [T]he objective in a hearing like this is to try to get suggestions from interested parties as to what the agency should do and *the preliminary proposal to narrow the scope of the standard* to just those . . . [SIC] codes *is just that, it's a preliminary proposal.*
>
> * * * *
>
> The agency's mind is not made up on that and we're ready to listen to anything and to accept any kind of evidence, orally or in writing, which you might have.
>
> * * * *
>
> The scope of the standard will be determined by the evidence presented. *The evidence will dictate what we do. Now if the evidence supports going beyond SIC Codes 20 through 39, we'll go beyond SIC Codes 20 through 39.*
>
> * * * *
>
> For that reason, we're having hearings across the country and obtaining new current information.[5]

In response to OSHA's notice, extensive evidence was submitted in the rulemaking proceedings supporting the application of the Standard to non-manufacturing industries,[6] including specifically the construction industry.[7]

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[4] *Informal Public Hearings on Hazard Communication before the Occupational Safety and Health Administration* (1982), transcript p. 14 (testimony of R. Leonard Vance).

[5] *Id.* at 27-30 (emphasis added).

[6] *See e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 411-13, 417-18, 606-07, 1354-55, 1360, 1470, 2123-24, 2193-97, 2254-61, 2653-54, 2808-09, 2936-37, 3036, 3077-79, 3597-98, 3814-27, and the following exhibits introduced therein: 19-109; 19-161; 36; 49; 52C; 62; 111; and 122.

[7] *See, e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 2123-24 (Rodney Wolford of the International Brother-

At the conclusion of the rulemaking, OSHA promulgated a final standard in November 1983. *See* 48 Fed. Reg. 53280 *et seq.* (1983). The scope of that Standard was broader than had been proposed in the March 1982 notice in one respect: where the proposal had required only chemical *manufacturers* to perform hazard evaluations and to prepare MSDSs and labels, the Standard as promulgated required chemical *importers* (and, in some instances, chemical *distributors* as well) to do the same. § 1910.1200(d)(1), (f)(1), (g)(1); 48 Fed. Reg. 53286-87, 53342-43. However, as in the March 1982 proposal, all other provisions of the final Standard were limited to employers in the manufacturing sector, *i.e.* SIC Codes 20 through 39.

In the preamble to the Standard, OSHA discussed its decision on the scope issue at length, characterizing that issue as one of the key "technical and policy issues raised by the proposed standard." *Id.* at 53284. Acknowledging that much evidence had been offered to support the proposition that the scope of the Standard should be expanded to include non-manufacturing industries, *id.* at 53286, OSHA explained its decision as follows:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need. [*Id.*]

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hood of Painters and Allied Trades (IBPAT)) (paint applicators in construction need HCS at least as much as those in manufacturing); Exh. 19-161 at 6 (IBPAT) ("the [health] problems and solutions for the paint and allied trades industry extend from the manufacturer through the applicator without regard for artificial distinctions such as SIC Codes"); Exh. 36 at 12-13 (AFL-CIO) (need for HCS "is as great in construction as in manufacturing"); Exh. 49 at 6-7 (UAW).

USWA and others filed petitions for review of the 1983 Standard. USWA contended, *inter alia*, that OSHA's decision to limit the Standard to the manufacturing sector was not supported by the rulemaking record, while petitioner Public Citizen attacked OSHA's determination not to adopt the *Registry of Toxic Effects of Chemical Substances* ("RTECS") published by the National Institute for Occupational Safety and Health ("NIOSH") as the base list of chemicals deemed to be hazardous.[8]

On review, the Third Circuit held that OSHA's rationale for confining the Standard to manufacturing "does not withstand . . . scrutiny." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 739 (3d Cir. 1985) (*"USWA I"*), AGC Pet. App. at 41a.[9] That court noted that OSHA's reasoning failed even to "address the . . . contention" that because the hazards dealt with by the Standard cut across all SIC Codes, it is irrational to limit the HCS to particular SIC Codes. AGC Pet. App. at 39a. And the Third Circuit recognized that OSHA's sole rationale for limiting the Standard to the manufacturing sector—namely, the contention that employees in that sector, taken as a whole, experience a higher rate of illness from exposure to hazardous chemicals than employees in other sectors—was doubly flawed. First, OSHA's contention was, at best, a gross overgeneralization, *see* AGC Pet. App. at 37a-38a; and second, even to the extent that the generalization might be sound, it would only provide a reason "why the . . . [HCS should apply to] employees in the manufacturing sector, [and would not explain] why the same information is not needed for workers in other sectors. . . ." AGC Pet. App. at 41a.

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[8] The RTECS list contains far more substances than the two lists adopted by OSHA. *See* 48 Fed. Reg. 53298 (1983).

[9] References to "AGC Pet. App." are to the Appendix to the Petition for Certiorari in No. 88-1070.

Relying on § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), which expressly mandates OSHA to promulgate standards that are designed to assure that "*no* employee will suffer material impairment of health," [10] the Third Circuit directed the Secretary "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." AGC Pet. App. at 42a. As that court subsequently explained, "[t]hat holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees." *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1267 (3d Cir. 1987) (*"USWA II"*), AGC Pet. App. at 63a.[11]

Instead of proceeding promptly to the reconsideration that had been ordered by the Third Circuit, OSHA delayed, and did nothing except to publish an Advance Notice of Proposed Rulemaking ("ANPR") soliciting public comment on various matters relating to industries not covered by the HCS. *See* 50 Fed. Reg. 48794 *et seq.* (1985). At that juncture USWA returned to the Third Circuit, filing a motion to enforce the order that court

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[10] Section 6(b)(5) provides in pertinent part that "[t]he Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . ., shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *See infra* at 20.

[11] The Third Circuit also rejected Public Citizen's challenge to OSHA's decision not to incorporate the RTECS list, holding that OSHA acted properly on the basis of its finding that the RTECS list was both overinclusive and underinclusive for this purpose. AGC Pet. App. at 42a.

had entered in *USWA I*. In *USWA II* the Third Circuit granted USWA's motion in pertinent part, concluding that the "further inquiry" in which OSHA was engaged "was unnecessary." AGC Pet. App. at 65a. That court held that the rulemaking proceedings conducted prior to the promulgation of the 1983 HCS had given adequate notice to all employers that the standard might cover non-manufacturing industries, and that there was no reason to conduct further proceedings because the original rulemaking record provided a proper basis for determining the final scope of the Standard. AGC Pet. App. at 65a-68a.[12]

Having determined that OSHA was unreasonably delaying the extension of the HCS to other industries, the Court of Appeals issued the following order, AGC Pet. at 68a (footnote omitted):

> [W]e will direct that the Secretary shall, within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard commu-

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[12] In that connection that Third Court noted that the 1983 Standard covered importers and distributors, even though the 1982 Notice had not done so:

> Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed. Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption. [*USWA II*, AGC Pet. App. at 67a.]

> nication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers.

Subsequently, on August 24, 1987, OSHA promulgated the Standard at issue here, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). In addition to expanding the coverage, OSHA modified the HCS in certain respects to "tailor" the Standard to fit the characteristics of the newly included industries. *Id.* at 31858. These modifications include provisions regarding multi-employer and multi-site workplaces, *see supra* note 3, and broadened exemptions from the Standard's requirements for certain drugs and consumer products, *see* 29 C.F.R. § 1910.1200 (b) (6) (vii), (viii); 52 Fed. Reg. 31862.[13]

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[13] On September 10, 1987, OSHA submitted the revised HCS to the Office of Management and Budget for review under the Paperwork Reduction Act. On the basis of its review OMB "disapproved" three provisions of the Standard: (1) the requirement that employers at multi-employer worksites exchange their MSDSs, either individually or through a central location, § 1910.1200(e)(2); (2) the new consumer product exemption, § 1910.1200(b)(6)(vii), which OMB opined should be broadened even more; and (3) the new exemption for drugs, § 1910.1200(b)(6)(viii), which OMB likewise stated should be broadened. OMB announced that these "disapproved" provisions could not go into effect. See *USWA III*, ABC Pet. App. at 29a.

In *USWA III* the Third Circuit overturned OMB's action, and directed the Secretary to put the "disapproved" provisions into effect. This decision is challenged in the certiorari petitions in Nos. 88-1075 and 88-1434. As noted above, the position of USWA and BCTD with respect to this matter is set out in their brief in opposition in No. 88-1434.

Most recently, OSHA has sought additional comments from the public, to guide the Agency in considering further modifications of the Standard; the notice of proposed rulemaking is published at 53 Fed. Reg. 29822. The period for submitting comments has now closed, and final action by OSHA is pending.

3. The Decision Below.

In *ABC v. Brock*, the Third Circuit rejected industry petitions for review of the revised HCS. That court determined, *inter alia*, (i) that all employers had received fair notice in the 1982 rulemaking proceedings that the Standard might be applied to their industries, *see* AGC Pet. App. at 10a-11a; (ii) that the "significant risk" requirement of the OSH Act was satisfied by OSHA's "significant risk finding [which] applied to all workers who would be exposed to hazardous chemicals," *id.* at 12a; (iii) that OSHA's findings satisfied the "feasibility" requirement of § 6(b)(5) of the Act, *id.* at 13a-14a; and (iv) that in adopting the ACGIH Threshold Limit Values list as one of the base lists of hazardous substances for purposes of the HCS, OSHA did not unlawfully delegate its rulemaking authority to a private body, *id.* at 15a.

ARGUMENT

The *certiorari* petitions to which we respond are like supertankers filled with soapsuds: those petitions contain a great volume of froth without any substance. As we demonstrate point-by-point, the questions presented concern in the main fact-bound issues generated by applying correct—indeed undisputed—legal principles to the situation at hand, none of which warrants this Court's attention and all of which were correctly resolved below. Moreover, while petitioners claim otherwise, it is perfectly clear that the decisions below are *not* in conflict with the decisions of this Court or of any of the other courts of appeals. The petitions should be denied.

1. The Rulemaking Notice: Petitioners challenge, as "clearly erroneous," ABC Pet. at 13, the Third Circuit's determination that non-manufacturing employers received adequate notice that the Standard here might be applied to their industries, and were thus "alert[ed] . . . of the opportunity to submit comments as to the cover-

age of their industry," *ABC v. Brock*, AGC Pet. App. at 11a.

As petitioner AGC twice acknowledges, the adequacy of a rulemaking notice is a "factual issue." AGC Pet. at 14, 27. This Court does not sit to review such fact-intensive determinations. And in any event, the Third Circuit's determination is clearly correct. As we have set forth in detail in the Statement, *OSHA's notice of proposed rulemaking explicitly identified the scope of the Standard as an open issue to be resolved in the rulemaking, and explicitly invited comments on that issue. See supra* at 4. This was reiterated by OSHA's representative at the outset of the rulemaking hearing, *id.* at 5, and was not lost on other parties, who submitted evidence on this very issue, *id.*[14]

Nor is there any force to the contention that OSHA "violated the plain language of [its] governing statute" by not publishing a proposed rule under which the HCS would apply to non-manufacturing industries. ABC Pet. at 11. *See also* NGFA/UT Pet. at 23-25. Petitioners rely on § 6(b)(2) of the OSH Act, 29 U.S.C. § 655 (b)(2), which provides that to initiate rulemaking, "[t]he Secretary shall publish a proposed rule. . . ." OSHA, of course, *did* publish a proposed rule. To be sure, the rule as proposed did not cover non-manufacturing

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[14] ABC asserts that "OSHA repeatedly made clear its position that the Standard would not apply beyond the manufacturing sector." ABC Pet. at 13, citing 47 Fed. Reg. 12101-02. But the cited passage itself makes clear that what ABC describes as OSHA's "position" was simply the Agency's *proposal*, which OSHA explicitly stated was subject to modification depending on the evidence received. *See supra* at 4.

As for petitioners' contention that "the final non-manufacturing HCS contained significant provisions nowhere mentioned in the manufacturing HCS," ABC Pet. at 12; *see also* NGFA/UT Pet. at 25 n.18, the Third Circuit correctly determined that "[t]he slight changes that were made in the standard were a logical outgrowth of the rulemaking record. . . ." AGC Pet. App. at 9a.

employers. But nothing in § 6(b)(2) suggests that a final rule must be identical to the proposed rule—either with respect to its scope or with respect to any other provision—and such a requirement "would lead to the absurdity that in rule-making . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

Thus, as ABC appears to acknowledge, the most that can be drawn from § 6(b)(2) is that a proposed rule "should be sufficiently descriptive of the '*subjects and issues involved*' so that interested parties may offer informed criticisms and comments." ABC Pet. at 11, quoting *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 48 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (emphasis added). OSHA's 1982 notice easily satisfied that test.[15]

2. "Foreclosure": AGC complains that the Third Circuit held that petitioners were " 'foreclosed' by *USWA I* and *II*" from litigating two questions: first, "that [petitioners] had received adequate notice in 1982 that the standard might eventually regulate them, and [second] that OSHA properly found significant risk as to all industries based on the 1982 rulemaking record." AGC Pet. at 27.

In point of fact, as to both of these issues the Third Circuit, while stating that petitioners *should* be foreclosed from raising the matter, nevertheless proceeded to consider—and to reject on the merits—petitioners' contentions. *See* AGC Pet. App. at 11a ("The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry.

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[15] Thus, the decision below does not conflict with *Ethyl Corp.* or with the other cases cited in ABC's Petition at 13 and in NGFA/UT's Petition at 23-25.

Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected."); *id.* at 13a ("Assuming . . . that th[e] opinions [in *USWA I* and *USWA II*] were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different.") Thus, AGC was not "foreclosed" from having its contentions heard by the court below, and the question whether such "foreclosure" would have been proper is not presented.

AGC's argument is frivolous in any event. In *USWA I* and *II* AGC was in the situation that confronts any party potentially affected by a regulation when a provision of the regulation that the party supports is under review on the petition of a party which holds the opposite view. In any such case, the party that approves of the agency's decision has the choice either to intervene in support of the agency or to rely on the agency to defend its position in court. AGC argues for a third option, contending that a party that chooses to ignore such a review proceeding should retain a right to obtain "full judicial review of the standard later," AGC Pet. at 28. That contention is unsupported by any precedent, would result in a myriad of review proceedings involving the same issues, and —even worse—would leave the status of an OSHA standard in limbo until all such "later" proceedings were resolved.

3. **Significant Risk:** The Third Circuit held that in promulgating the HCS OSHA properly made a "significant risk finding [that] applied to all workers who would be exposed to hazardous chemicals." AGC Pet. App. at 12a-13a. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (the *Benzene case*) (OSH Act embodies a requirement that a standard must be directed at ameliorating a "significant risk"). AGC and NGFA/UT assail this determination, contending that a finding of significant risk requires "industry-specific showings." AGC Pet. at i, 16; NGFA/UT Pet.

at 27-28. ABC makes a similar contention, ABC Pet. at 15.[16]

There is nothing in the OSH Act or in the *Benzene* case to suggest that a finding of significant risk must be made on an industry-specific basis. Indeed, the concept of an "industry" plays no role in the scheme of the Act.[17] It is, moreover, simply not the case that every health or safety hazard varies so dramatically from one "industry" to another as to make it necessary to analyze each industry separately in order to determine whether a significant risk exists. Rather, as the Third Court correctly recognized, where OSHA properly concludes that the hazard involved (here, lack of information on the part of employees regarding the chemical hazards encountered on the job) is *common to all industries*, the logic of the

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[16] ABC couples its "significant risk" argument with additional contentions that we discuss *infra* at 19-20.

[17] The only reference to the term "industry" in the substantive provisions of the Act is in § 6(g), 29 U.S.C. § 655(g), which states that "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments." Nothing in the Act requires findings specific to each "industry," any more than the Act requires findings specific to each "trade," "craft," "occupation," "business," "workplace," or "work environment."

What is more, the term "industry" is not defined in the Act, nor has it been defined by petitioners, and the concept is an elusive one. For example, in the Standard Industrial Classification system, establishments are grouped into nine "divisions," which are in turn broken into more than eighty "major groups," designated by two-digit SIC Codes. See 52 Fed. Reg. 31868 (1987). Those two-digit classifications are further subdivided into three-digit and four-digit codes. The construction "industry" comprises Division C, consisting of three "major groups" and innumerable subdivisions. *Id.* AGC does not explain whether a requirement of "industry-specificity" would apply at the level of the nine "divisions," the more than eighty "major groups," or the hundreds of three- and four-digit SIC Code groupings.

situation and of the OSH Act is that the Agency may make a significant risk determination of corresponding breadth. No case has held to the contrary.[18]

Petitioners also assert that circumstances in the construction industry are such that employees in that industry, unlike their counterparts in other industries, face no significant risk when the employees are denied the information regarding chemical hazards that is required by the HCS. *See* AGC Pet. at 17-18; ABC Pet. at 15. That substantial evidence question does not warrant review and was, in any event, correctly resolved below.

OSHA found that as of 1977 the chemical source illness incidence rate in the construction industry, as reported by the Bureau of Labor Statistics ("BLS"), was 1.7 per 1,000 workers, *see* 48 Fed. Reg. 53285 (1983); and, as OSHA recognized, the incidence rates reported by BLS are seriously understated, *id.* at 53284. Of the eight major industrial sectors, only agriculture and manufacturing had higher chemical source illness incidence rates than construction. *Id.* at 53285. What is more, witnesses intimately familiar with conditions in the construction industry testified to the need for the Standard in this industry. *See* evidence cited *supra* note 7. Thus petitioners' contentions misstate the record.

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[18] In the case upon which petitioners principally rely, *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980) (*see* AGC Pet. at 16-17; NGFA/UT Pet. at 27-28; ABC Pet. at 15), medical studies affirmatively demonstrated that American *cotton gin workers* "do not suffer any long term impairment" from cotton dust exposure, 630 F.2d at 408. In those circumstances the Fifth Circuit held that studies showing the existence of such chronic impairment in *other* aspects of cotton manufacturing could not support a conclusion that a significant risk existed in *ginning*. *Id.* at 409. The holding in the case did not extend beyond that fact-bound determination; and the court certainly did not assert that OSHA must always assess significant risk industry-by-industry, or SIC Code-by-SIC Code.

4. Feasibility: Petitioners contend (1) that OSHA and the Third Circuit were required to "undertake [] an industry-by-industry analysis of feasibility," AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29; and (2) that the Court of Appeals improperly shifted the burden of proof on the question of the feasibility of the HCS to petitioners, *see* ABC Pet. at 16; AGC Pet. at 19-20, NGFA/UT Pet. at 29. The first contention misstates the law and the second contention misstates the Third Circuit's holding.

A. The feasibility requirement of the OSH Act requires only that the obligations imposed by a standard must be "capable of being done." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09 (1981) (*"ATMI"*). In determining whether this test has been met, the Act does not require OSHA to support its findings with an industry-by-industry analysis, but rather with "substantial evidence," however derived. OSH Act § 6(f), 29 U.S.C. § 655(f).[19] Furthermore, the very cases petitioners cite recognize that OSHA cannot be expected "to prove [a] standard *certainly* feasible for *all* firms at *all* times in *all* jobs," *United Steelworkers of America v. Marshall*, *supra*, 647 F.2d at 1270 (emphasis by the court), cited in ABC Pet. at 17, AGC Pet. at 20, and NGFA/UT Pet. at 29. Rather, OSHA need only establish a "presumption of feasibility," 647 F.2d at 1270, which "remains rebuttable," *id. See also ASARCO, Inc. v. OSHA*, 746 F.2d 483, 496, 498-99 (9th Cir. 1984).

Of course, in some cases the nature of a standard is such that the feasibility of compliance can be expected to vary dramatically from one context to another, and there is consequently a need to assess feasibility on a context-by-context basis. This is true, for example—and a presumption of feasibility must therefore be established separately as to each affected type of work—when a

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[19] See *supra* note 17 and text thereat.

standard requires the use of engineering controls and the controls that can be implemented in one industrial setting are entirely different from those that can be implemented in another. That was the situation in *Steelworkers v. Marshall* and in each of the cases cited by petitioners, *see* AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29. But petitioners overread those decisions just as they overread the "significant risk" cases discussed *supra* at 16 and n.18. The essence of the matter is that no decision holds that an industry-by-industry analysis is required in every case, without regard to the nature of the standard in question; and, as we have shown, nothing in the statute would support such a requirement.

In this case, the obligations imposed by the HCS on petitioners are very modest, and are of such a nature as to be well within the capabilities of any industry, *see supra* at 2-3. In these unique circumstances the Third Circuit was entirely justified in dismissing petitioners' claims of infeasibility with these words:

> When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. [*ABC v. Brock*, AGC Pet. App. at 14a.]

B. Nor did the Third Circuit improperly shift any evidentiary burden to petitioners with respect to the feasibility issue. Because, as discussed, there was ample basis for concluding that the modest obligations imposed by the HCS are feasible for all industries, the Third Circuit's holding that the Standard should apply to all industries except where OSHA "can state reasons why such application would not be feasible," *USWA I*, 763 F.2d at

739, AGC Pet. App. at 51a-52a, simply represents a proper application, in the factual context of this case, of the approach articulated in the very cases petitioners endorse. For those cases hold that OSHA need only make a finding of "*general* feasibility," *Steelworkers v. Marshall*, *supra*, 647 F.2d at 1272 (emphasis added); *ASARCO, Inc. v. OSHA*, *supra*, 746 F.2d at 498, while leaving open the possibility that the general finding may be rebutted by evidence of *infeasibility* in a particular setting. *See supra* at 17.

In any event, OSHA did not merely find an absence of evidence of *infeasibility*, but affirmatively found that compliance *is feasible* in all industries. *See* 52 Fed. Reg. 31855-57 (1987). Thus when all is said and done, petitioners' arguments reduce once again to a contention that OSHA and the Third Circuit gave less weight than petitioners would like to the allegedly unique circumstances of their industry. *See supra* at 16. OSHA however fully explained its rejection of petitioners' position, *see* 52 Fed. Reg. 31859 (1987), and this factual dispute presents no question worthy of this Court's review.

5. **Reasonable Necessity:** ABC and AGC raise a series of vaguely formulated—and, as we show, insubstantial—arguments based on § 3(8) of the Act, 29 U.S.C. § 652(8), which defines an "occupational safety and health standard" as a standard the requirements of which are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *See* ABC Pet. at 14-16; AGC Pet. at 21-23.

A. ABC relies on the portion of the *ATMI* case, 452 U.S. at 536-40, striking down an earnings-protection provision in the Cotton Dust Standard. *See* ABC Pet. at 14.[20] The infirmity the Court found in that provision was that:

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[20] The standard required employers to provide employees who were physically unable to wear a respirator the opportunity to

> OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." [452 U.S. at 538].

In other words, the Court held that OSHA may not promulgate a provision designed solely "to repair general unfairness to employees that is unrelated to achievement of health and safety goals." *Id.* at 540. The HCS contains no such provisions.[21]

B. The *ATMI* Court, while holding that § 3(8) cannot be construed to "countermand" the specific requirement of § 6(b)(5) that in promulgating standards for toxic materials OSHA must promulgate the most protective standard feasible, 452 U.S. at 513,[22] suggested that § 3(8) "might come into play as an additional restriction" if OSHA were to impose requirements in a standard that were entirely *redundant*, such that "the *same reduction* in health risk" would be achieved in the

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transfer to another position. The challenged portion of that provision required "the employer [to] guarantee that the employee [who transfers] suffers no loss of earnings or other employment rights or benefits." 452 U.S. at 537.

[21] As long as a provision promulgated by OSHA has a health-protective purpose and is consistent with the Agency's mandate to promulgate the most protective standard that is feasible, the provision need only satisfy the familiar test that regulatory action must be "reasonably related to the purposes of the enabling legislation." *Forging Industry Assn. v. Secretary of Labor*, 773 F.2d 1436, 1447 (4th Cir. 1985) (*en banc*), quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). *Accord, Steelworkers v. Marshall, supra*, 647 F.2d at 1237. There is no contention here that the HCS fails that test.

[22] *See also National Grain and Feed Ass'n v. OSHA*, slip op. at 5-7 (5th Cir. Jan. 24, 1989), *modifying opinion published at* 858 F.2d 1019 (1988); *Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988); *ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984).

absence of the superfluous requirements. 452 U.S. at 514 n.32 (emphasis added).[23] *Cf. ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984). AGC asserts that OSHA transgressed that *possible* limitation here and that this case is an "ideal vehicle" for settling the scope of § (8). AGC Pet. at 21. This case does not, however, raise any question as to § 3(8)'s scope.

All parties to these cases have proceeded on the assumption that if "the *same reduction* in health risk" (*ATMI, supra*) would occur in the absence of the Standard, the Standard would be invalid. Petitioners' contention that the HCS is subject to attack on this ground failed not because of any disagreement on the governing legal rule but because the contention is unsupportable on the facts.[24]

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[23] In the same footnote the Court left open the question "[whether] § 3(8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6(b)(5) of the Act." *Id.* at 513 n.32. Since the HCS was promulgated under § 6(b)(5) no such § 3(8) question is presented here. A related question is whether such balancing might be required or permitted in the case of standards dealing with *safety*, as distinguished from *health*; that is the issue with which "the Fifth Circuit has recently struggled," AGC Pet. at 22-23. *See National Grain and Feed Ass'n v. OSHA, supra.* Since the HCS is a *health* standard, *see* 48 Fed. Reg. 53320 (1983); *USWA I*, AGC Pet. App. at 40a-42a, the question presented in that case is not presented here.

[24] Thus, ABC contends that there is no need for the HCS in construction because construction contractors are already subject to a training requirement. ABC Pet. at 15, citing 29 C.F.R. § 1926.21. This argument is patently lacking in merit. OSHA properly determined that effective hazard communication requires three components, and that "[n]o one of these three components alone—labels, material safety data sheets, or training—can be demonstrated to be completely effective in communicating hazards." 48 Fed. Reg. 53311 (1983). *See also* 52 Fed. Reg. 31858-59 (1987) (discussing the need for MSDSs in the construction industry in order to make training programs effective). The Third Circuit was therefore correct in concluding that the provisions of the HCS which "require[] . . . maintenance on the jobsite of information on

6. Setting Rulemaking Priorities: AGC asserts that in *USWA I* and *USWA II* the Third Circuit intruded on the administrative province by interfering with OSHA's setting of rulemaking priorities. AGC Pet. at 24-26.

As a threshold matter AGC did not advance this contention below, and therefore cannot do so now.[25] It can moreover easily be shown that AGC's contention is unfounded and, out of caution, we make that showing now.

Unlike cases where parties seek to compel OSHA to undertake a rulemaking the Agency does not wish to undertake, or to expedite a rulemaking the Agency does not wish to expedite (see cases cited in AGC Pet. at 26), *USWA I* involved a challenge to OSHA's resolution of an issue that was squarely presented and resolved in a *completed* rulemaking that OSHA undertook of its own accord. In *USWA I* no party was seeking to dictate how OSHA's rulemaking resources should be allocated; the

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[chemical] risks can only make the existing training more effective." *AGC v. Brock*, AGC Pet. App. at 13a.

AGC complains about the requirement that MSDSs must be "physically present on every construction jobsite," AGC Pet. at 22; but as OSHA determined, this is needed so that "[e]mployees will . . . be able to access the information as required." 52 Fed. Reg. 31865 (1987) (discussing written hazard communication programs). *See also id.* at 31866 (discussing MSDSs).

And, AGC's contention that the HCS requires employers to provide "redundant hazard training to experienced construction tradesmen each time they move from job to job," AGC Pet. at 22, grossly exaggerates the actual requirements of the HCS in this regard—requirements that are "performance-oriented" and flexible. 52 Fed. Reg. 31866 (1987), 48 Fed. Reg. 53311-12 (1983).

[25] AGC's briefs to the Third Circuit did not even cite the provision of the OSH Act, § 6(g), 29 U.S.C. § 655(g), upon which AGC now seeks to base its argument. What is more, the case in which AGC has sought certiorari, *ABC v. Brock*, is, by AGC's own account, "not 'the same case' " as *USWA I* and *II*. *See* AGC's Reply Brief in *ABC v. Brock* at 7. Accordingly, AGC cannot, by petitioning for certiorari in *ABC v. Brock*, bring before this Court the rulings in *USWA I* and *II*.

only question presented was whether a standard actually issued by the Agency satisfied the requirements of § 6(b)(5). *See supra* at 7-8. As the Third Circuit recognized, OSHA's authority to set rulemaking priorities, embodied in § 6(g) of the Act, 29 U.S.C. § 655(g), does not shield the Agency from being called to account when a standard promulgated by the Agency for toxic substances provides less protection than § 6(b)(5) mandates, whether the failure is in not providing proper protection to covered employees or in not properly covering employees. *USWA I*, AGC Pet. App. at 40a, *citing United Steelworkers of America v. Marshall*, *supra*, 647 F.2d at 1309-10. *See also Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1270-72 (D.C. Cir. 1988); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). The decisions are uniform on this point.[26]

The decision in *USWA II*, which required OSHA to complete the reconsideration required by *USWA I* without the unnecessary delay that would be occasioned by another round of notice-and-comment, represented, in turn, a straightforward application of the Third Circuit's express statutory authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), bolstered by that court's authority to enforce its judgment in *USWA I* by issuing "all writs necessary or appropriate in aid of" its jurisdiction, 28 U.S.C.

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[26] The Third Circuit's reliance on the D.C. Circuit's decision in *Steelworkers v. Marshall* is answer enough to AGC's contention that the Third Circuit's resolution of this issue "squarely conflict[s] with several rulings of the D.C. Circuit, which has articulated a much more exacting standard for judicial intervention into OSHA's priority-setting." AGC Pet. at 26.

In *Steelworkers v. Marshall* the D.C. Circuit made it clear that a decision to exclude an industry from a standard, made after a rulemaking in which that point was at issue, is subject to full judicial review and must be shown to comport with the record evidence and the statutory mandate. *See* 647 F.2d at 1309-10.

§ 165(a). *See USWA II*, AGC Pet. App. at 68a. AGC's assertion that the court below was simply seeking to impose on OSHA its "own notion of which procedures are 'best,'" AGC Pet. at 24, quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is empty rhetoric that has no basis in the Third Circuit's order.

7. Delegation to a Private Party: NGFA contends that OSHA "delegat[ed] . . . its rulemaking authority to a private entity," NGFA/UT Pet. at i, 9, by adopting the Threshold Limit Values list of the American Conference of Governmental Industrial Hygienists (ACGIH), as one of the base lists of hazardous substances covered by the HCS; and NGFA argues that this "delegation" violated both the OSH Act, NFGA/UT Pet. at 10-19, and the Constitution, *id.* at 19-22. This contention is not worthy of further review on two independent grounds.

A. The "delegation" issue is of no present practical moment by reason of a recent rulemaking action by OSHA. NGFA has attacked OSHA's alleged delegation of authority only with regard to the inclusion of *grain dust* as a hazardous substance.[27] As a result of a new standard for Air Contaminants published by OSHA on January 19, 1989 (amending 29 C.F.R. Part 1910, Subpart Z), *grain dust is now covered by the HCS under the provision that covers all substances included in the Air Contaminants Standard* as well as under the provision providing coverage by reason of the ACGIH listing. *See* 29 C.F.R. § 1910.1200(d)(3), discussed *supra* at 2-3. OSHA took the step of adding grain dust to the Air Contaminants Standard after reviewing the "substantial amount of information . . . submitted to the record [of

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[27] This was the extent of NGFA's challenge case in the court below as well as in this Court. Indeed, NGFA would lack standing to challenge the HCS as the Standard applies to anything other than grain dust.

the Air Contaminants rulemaking] addressing the health evidence [with respect to grain dust]," and determining "that an exposure limit for grain dust is necessary to reduce the significant risk of adverse respiratory effects associated with exposure to this material." 54 Fed. Reg. 2510 (Jan. 19, 1989).

Against this background, a ruling in NGFA's favor on its "delegation" claim would have no effect on NGFA's hazard communication obligations.[28] Thus the "delegation" question is only of academic interest in this case.

B. Turning to the merits, NGFA seeks to extend the delegation concept to new lengths by arguing that OSHA "delegated its rulemaking authority" to a private entity by adopting that entity's scientific determination that certain substances are hazardous. The Government relies on the determinations of private scientists from Newton on down every day. And NFGA does not cite a single case in which this Court or any other has struck down, on statutory or constitutional grounds, *any* regulation as an unlawful delegation of authority to a private entity, much less a regulation involving the kind of normal and benign reliance on private scientific learning involved here.[29]

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[28] Even without the recent amendment to Subpart Z, it is far from clear that NGFA would have standing to attack the use of the ACGIH list. As NGFA has acknowledged, grain dust is covered under the HCS as a *physical* hazard, due to its combustibility. *See* Exh. 2-97, OSHA Docket H-0221 (NGFA requests exemption for grain dust on the ground that its combustibility is "unmistakable"). *See also ABC v. Brock*, AGC Pet. at 13a ("As to the risks posed by grain dust, the propensity of grain elevators to blow up has been well documented"). Grain dust would therefore be covered by the HCS as a *physical* hazard even if the dust were not listed as a *health* hazard by ACGIH or OSHA. *See* 29 C.F.R. § 1910.1200(c), 52 Fed. Reg. 31879 (1987) (defining "hazardous chemical" as "any chemical which is a physical hazard or a health hazard").

[29] Insofar as the statutory question NGFA seeks to raise is concerned, the most that can be said of § 6(a), 29 U.S.C. § 655(a),

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

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and of its legislative history, discussed at length in NGFA Pet. at 14-17, is that OSHA is not *compelled*, and perhaps not permitted, to adopt ACGIH *standards* without engaging in § *6(b) rulemaking*. Here, as noted, OSHA did not adopt any ACGIH *standard*. Rather, *after a § 6(b) rulemaking*, OSHA simply determined that certain scientific determinations by ACGIH should be adopted as one of the mechanisms for triggering the applicability of substantive regulatory requirements *crafted by OSHA*.

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Nos. 88-1070, 88-1075, 88-1385 and 88-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

[Captions Continued on Inside Cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1070

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,

Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1385

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is associated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Most of the NAM member companies are heavily regulated in many areas of their activities, at substantial expense to the member companies and to the consumers of their manufactured products. A significant portion of the expense is associated with a broad array of federal requirements to create, disseminate and keep records. Most of the regulation and recordkeeping requirements are not directly imposed on NAM members by statute; they are imposed principally by agency rules.

The members of NAM have been covered by a Hazard Communication Standard ("HCS") since 1983, and are not directly affected by the adoption of an HCS for non-manufacturers. However, the members of NAM are vitally affected by the Third Circuit's decisions undermining the procedural safeguards contained in the requirements of the Administrative Procedure Act ("APA") and the Occupational Safety and Health Act ("OSH Act") that agency rules only be adopted after notice and opportunity to comment. Likewise, NAM's members are adversely affected by the Third Circuit's restrictive interpretation of the Paperwork Reduction Act of 1980, a law which has benefited the productivity of American manufacturers by ameliorating the burdens of federally sponsored paperwork.

NAM therefore submits this brief as *amicus curiae*, with the consent of all parties, in support of the Petitions for Writs of Certiorari in order to assist the Court in evaluating the importance of the issues presented.

PRELIMINARY STATEMENT

These cases bring before the Court two major issues affecting the functioning of all federal administrative agencies. The first issue is whether the notice and opportunity to comment on a proposed HCS for manufacturers was sufficient under the APA and the OSH Act for the adoption of a final HCS for non-manufacturers. The second issue is the scope of the authority of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1980 to reduce paperwork requirements imposed by the Occupational Health and Safety Administration ("OSHA"). Petitioners seeks writs of certiorari in connection with two cases decided by the Third Circuit. *Associated Builders and Contractors, Inc. v. Brook*, No. 88-1075 (3d Cir., Nov. 25, 1988) (a consolidation of four petitions for review of administrative action), and *United Steelworkers of Am. v. Pendergrass* (USWA III), 855 F.2d 108 (3d Cir. 1988).

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT HAS REDUCED THE MINIMUM PROCEDURAL STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT BELOW THE PARAMETERS ESTABLISHED BY CONGRESS AND THE SUPREME COURT. THIS REDUCTION WORKS A SUBSTANTIAL HARDSHIP ON INDIVIDUALS AND ORGANIZATIONS THAT PARTICIPATE IN REGULATORY MATTERS AND DIMINISHES THE QUALITY OF RULEMAKING.

The United States Court of Appeals for the Third Circuit violated the APA and the OSH Act in adopting an HCS for non-manufacturers without permitting OSHA to provide non-manufacturers with notice and an opportunity for comment beyond that afforded by the original notice applying an HCS to manufacturers in 1982. 42 Fed. Reg. 12,092 (1982). Insofar as that court's action is seen as allowing rulemaking without notice and comment, the decision is a novel departure from settled law [1], is at odds with other Circuits [2], works a substantial hardship on individuals and organizations who participate in regulatory matters, disserves the government agency seeking the views of the affected public, and is deserving of reversal by this Court.

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[1] *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981) (OSHA must show each specific provision of safety standard contributed to increased safety); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 667 (1980) (plurality invalidated OSHA's benzene standard because of failure to explain how rule would benefit workers).

[2] *See, e.g., AFL-CIO v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

A. This Court Should Resolve The Question of What Degree of Change Between Proposed and Final Rulemakings Triggers a Requirement For a New Proposal.

Both the APA and the OSH Act require OSHA to provide notice and opportunity for comment on proposed regulations before they become final. 5 U.S.C. § 553(b) (1982) and 29 U.S.C. § 655(b) (1982). Under order of the Third Circuit, OSHA published no proposed regulations on the application of an HCS to the non-manufacturer employers.

The Third Circuit justified its order prohibiting further notice by relying on its earlier decision in *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) and similar decisions in the United States Court of Appeals for the District of Columbia. *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). Those lower court decisions established that a final rule may differ from the proposed rule where the change is a "logical outgrowth" of the rulemaking proceeding. 647 F.2d at 1221; *NRDC v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987) (stating that substantial changes can be made "as long as the final changes are in 'character with the original scheme' and 'a logical outgrowth' of the notice and comment.")

The proper scope of this "logical outgrowth" concept is

> an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U.S.C. § 553, or similar provisions in new Acts of Congress for review of agency action.

Eli Lilly & Co. v. Costle, 444 U.S. 1096, 1096 (1980) (Rehnquist, J. dissenting on denial of petition for writ of certiorari). Chief Justice Rehnquist's statement is

prophetic: the issue has continued to grow in importance, lacking needed guidance from the Supreme Court. The Court should review this case to resolve the critical question of how much change in a proposed rule is permissible without a reproposal begore final promulgation.

The application of a standard to an entirely new group of industries cannot be deemed a "logical outgrowth" of a proposed rule which did not previously affect those industries. The impacts of an HCS on the construction and agricultural communities differ significantly from the impacts on the manufacturing community initially covered.[3] In addition to qualitative differences between the affected communities, the quantitative change effected by extending the HCS from manufacturers to non-manufacturers eliminates any logic in the growth of the standard without additional notice and opportunity to comment.[4]

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[3] The 230% average turnover rate in the construction industry and the outdoor nature of construction work contrast with the "prototypical manufacturing workplace, which is generally a stationary worksite with a relatively stable workforce." Comments of the Associated General Contractors of America, Oct. 23, 1987, attached as Appendix 5 to the Petition for Review of a Final Rule of the Occupational Safety and Health Administration, *Associated Gen. Contractors v. OSHA* (3d Cir.) (No. 88-1070), at 13a.

[4] The August 24, 1987 expanded rule applied an HCS, without notice and opportunity to comment other than that afforded in 1982, to 4,503,879 theretofore uncovered establishments with a total employment of 58,890,236, of which an estimated 18,391,096 employees are exposed in the workplace to hazardous chemicals. 52 Fed. Reg. 31,852, 31,871. OSHA estimated the cost of the application to non-manufacturing employers to be $687.2 million in the first year, with substantial additional costs each year thereafter. *Id.* at 31,873. Indeed, without the benefit of a notice of proposed rulemaking, OSHA may have seriously underestimated both coverage and cost impact of its new rule. For example, the Association of General Contractors testified before OMB that compliance in the construction industry would require 58 million man hours in the first year with costs for retraining at 38 million man hours for subsequent years. In contrast, OSHA estimated the costs at 34 million and 8 million respectively for all industries.

The final rulemaking extending the HCS to non-manufacturers is not a logical outgrowth of the initial standard and should have triggered a new proposal to allow comment since the non-manufacturers did not have "a fair opportunity to present their views on the contents of the final plan." 824 F.2d at 1283. The error of the Third Circuit in bypassing the APA and OSH Act notice and comment requirements for the entire non-manufacturing sector of the nation's industry provides an important opportunity for the Supreme Court to clarify the standards for re-proposal of proposed regulations.

B. The Practical Inability of the Public to Follow the Enormous Range of Rulemaking Activities Which May Potentially, But Not Expressly, Affect Them Makes a Clear Standard For Notice and Comment Imperative.

In addition to the unfairness to the non-manufacturers here, the practical consequences of the Third Circuit's decision for all future rulemakings are worrisome. "Agencies could in the future publish vague, ambiguous notices in the Federal Register, adverting obliquely to certain issues or proceedings, and then, months or years later, promulgate final rules and claim that constructive notice had been given." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978).

In each of the past five years, more than 3,000 proposed rules and 4,500 final rules have appeared in the Federal Register. Office of Management and Budget, Executive Office of the President, *Regulatory Programs of the United States Government, April 1, 1987 to March 31, 1988* 636.

Given this large number of federal rulemakings, those who are regulated and their associations, such as NAM, must limit the proposed rules that receive close attention.

When an agency announces, as OSHA did here,[5] that it will not adopt a standard for a class of the regulated community, members of that class typically pass on to other issues. Under the Third Circuit's rule, those excluded from regulation will nevertheless have to participate in rulemakings in which there is any shadow of an implication in the preamble that they might be included. This will lead to added expense and complexity for private and government parties.

The result for the courts is also worrisome. When an agency promulgates a final rule that excludes a sector of the regulated community and a review petition is filed, the seemingly excluded persons will have no choice but to intervene in the litigation to protect their interests. This will lead to unnecessary court interventions and will make such cases even more complex and burdensome.

Furthermore, the appropriateness, clarity, and efficacy of regulations which have not had the benefit of comments from all those potentially affected will be significantly diminished. "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). OSHA itself recognized the need for notice and comment so that the final regulation could accurately reflect the differences amnong the groups covered. OSHA stated that the HCS as developed "focused on existing practices and desirable implementation methods in manufacturing industries," and urged the Third Circuit to permit reproposing the regulations before applying them to non-manufacturers. Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Secretary of Labor (No. 83-3554) at 9. The need for a reproposal is evident from the record before OMB. Confusion over issues of coverage, scope and practicality raised by participants at the OMB hearings easily could

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[5] 47 Fed. Reg. 12,092, 12,101-12,102 (1982).

have been addressed and clarified through a rulemaking proposal.[6] The Third Circuit decision deprived the agency of the opportunity "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule . . . ." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

C. The Third Circuit Could Have Instead Imposed Detailed Time Deadlines on OSHA.

Whatever the frustrations of the labor organization petitioners with the pace of achieving their goal, the Third Circuit should not have meddled in agency procedure to speed up agency action.[7] The court could have imposed a reasonable time limit instead. The ability of courts to fashion remedies that achieve results without interfering with the agency's attempt to assure adequate notice and comment is amply demonstrated by the remand issued in *EDF v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (ordering EPA to adhere to a schedule for fulfilling its statutory obligations).

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[6] For example, The National Druggist Association raised legitimate questions as to whether capsules which contain powders or liquids were exempt from the rule noting that if they were not, an additional $3,400,320 in compliance costs would be incurred by druggists. October 16, 1987 hearing before OMB at 174. Similarly, the Small Business Administration testified that OSHA had underestimated the first year cost impact by over one billion dollars. Statement of Charles A. Cadwell, U.S. Small Business Administration before the Office of Management and Budget, Oct. 16, 1987.

[7] The Third Circuit's repeated references to the time intervals between agency actions and court proceedings indicates that the Third Circuit may also have shared in this frustration. *See United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 732 (3d Cir. 1985), and *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263, 1265, 1266, 1269 (3d Cir. 1987).

II. COURTS SHOULD NOT INTERFERE WITH AGENCY ACTIONS THAT ARE LAWFUL AND REASONABLE. REVIEW IS NEEDED IN ORDER TO MAKE CLEAR THE VITALITY OF THE DOCTRINES EXPRESSED BY THE SUPREME COURT IN *VERMONT YANKEE* AND *CHEVRON*.

The Third Circuit ignored the principles of judicial restraint enunciated in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). *Vermont Yankee* limited the courts' ability to interfere in the procedural actions of agencies. 435 U.S. at 555. The Third Circuit violated this precept in a novel context that needs review by the Supreme Court. *Vermont Yankee* restrained the judiciary from imposing procedural requirements on federal agencies in *excess* of those required by Congress. In the present case, the Third Circuit interfered with the agency's chosen procedure by imposing procedural requirements *less* than those required by Congress and selected by the agency.

By compelling OSHA to skip over the procedures required by the APA and the OSH Act, the Third Circuit violated the *Vermont Yankee* principle that courts should not interfere with agency actions permissible under statute. Even assuming *arguendo* that the notice afforded non-manufacturing employers in the 1982 rulemaking was in theory legally sufficient to allow OSHA to go directly to a final rule, under *Vermont Yankee* the Third Circuit should not have ordered the agency to abandon its choice to collect more information and undertake a notice and comment rulemaking. Indeed the force of the *Vermont Yankee* rule is all the greater when, as here, the agency seeks to give more procedural safeguards and thereby avoid statutory and even constitutional questions of fairness. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Court should review this case to assert the vitality of *Vermont Yankee.* Surely it cannot be true, as one commentator has stated, that *Vermont Yankee* is "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, Administrative Law Treatise 616 (2d ed. 1978), quoted and discussed in, Scalia *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 (1978). It is time for the Court to explain the authority and authoritativeness of *Vermont Yankee.* The Court should review this case to emphasize "that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND LIMITS IMPROPERLY THE AUTHORITY OF OMB UNDER THE PAPERWORK REDUCTION ACT TO MINIMIZE PAPERWORK BURDENS IMPOSED ON THE PUBLIC.

A. The Importance of the Paperwork Reduction Act to the Hazard Communication Standard.

The Paperwork Reduction Act of 1980 ("PRA") is the culmination of longstanding efforts by Congress [8] to "minimize the Federal paperwork burden for individuals, small businesses, state and local governments and other persons." 44 U.S.C. § 3501(a)(1). The critical need for this law was established by the Commission on Federal Paperwork, which concluded in its final report that federal paperwork requirements imposed annual costs of 25

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[8] The Paperwork Reduction Act was a "rewrite" of the Federal Reports Act of 1942, and was intended to "strengthen the clearance process" established under the prior law. S. Rep. No. 96-930, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U..S Code Cong. & Admin. News 6241, 6253.

to 35 billion dollars on private industry, and 8.7 billion dollars on individuals.[9] To minimize this formidable burden, Congress directed OMB to review all information requests proposed by agencies to determine whether such collection of information "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility." 44 U.S.C. § 3504(c)(3) (1982). The effectiveness of the PRA in ameliorating the burden on the public has been great. Between 1981 and 1986, agencies subject to PRA review have reduced the paperwork burden imposed on the public by over 560 million hours annually[10] or 44 percent of the burden that existed in 1980.[11] The Administration estimated that the paperwork burden on the public in fiscal year 1988 would decrease by 66.1 million hours, representing the seventh year of reduction by the federal government since 1981.[12]

OMB adhered closely to its lawful authority in reviewing OSHA's final HCS and, based on an extensive record and detailed consultation with the agency, disapproved three limited provisions in the rule.[13] OMB's disapproval

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[9] *Final Summary Report of The Commission on Federal Paperwork* 5 (1977).

[10] March 10, 1988 Letter from James C. Miller III, Director, Office of Management and Budget, to President Ronald Reagan transmitting the Administration's Information Collection Budget for Fiscal Year 1988, 1.

[11] Executive Office of the President, Office of Management and Budget, *Regulatory Programs of the United States Government, April 1, 1987-March 31, 1988*, 1-1i.

[12] *See* March 10, 1988 letter from James C. Miller III, 1. According to the letter a net increase of approximately 140 million hours resulted from three federal statutes enacted in 1987.

[13] The Third Circuit, in ordering the Secretary to proceed directly to a final rule without the benefit of a notice of proposed rulemaking prevented OSHA from complying with 44 U.S.C. § 3504(h). That

of the requirement that material safety data sheets ("MSDSs") be exchanged by each employer at multi-employer worksites was based solely on the determination that such requirement "does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces." [14] OMB also disapproved the overly narrow scope of the exemption for consumer products, stating, "the record indicates that this exemption would continue to place under the HCS large number of consumers for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." [15]

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section requires an agency to notify OMB not later than publication of notice, of any proposal rule which includes a collection of information requirement. This important procedural requirement, sponsored by Senator Kennedy as Amendment 1177 of the Senate Judiciary Committee, is intended to coordinate Executive review of collection of information requirements in agency rulemakings with regulatory oversight by the Executive Office of the President by providing the agency an opportunity to respond to OMB comments. *See* Remarks of Senator Edward Kennedy, 126 Cong. Rec. 14,689 (daily ed. Nov. 19, 1980). Thus, the Court's short-circuiting of the APA also thwarted the critical interagency deliberative process required by the Kennedy Amendment.

[14] October 28, 1987 letter from Wendy L. Gramm, Administrator for Information and Regulatory Affairs, Office of Management and Budget, to the Honorable Thomas C. Komarek Assistant Secretary for Administration and Management, Department of Labor, disapproving the collection of information requests in the final HCS. The record is replete with examples where trade groups demonstrated in testimony before OMB that this provision of the HCS had no practical utility. These same groups provided numerous alternatives which would accomplish the same objective of workplace hazard communication without the full paperwork burden imposed by the rule. *Id.* at 7-9. *See also* October 28, 1988, "Comments and Request for Hearing by the Construction Industry Hazard Communication Coalition Proposed Revisions to OSHA Hazard Communication Standard" (53 Fed. Reg. 29,821), submitted to OSHA Docket Officer at 17-19.

[15] Letter of Gramm to Komarek at 8. The OMB record illustrated how OSHA's limited consumer product exemption (29 C.F.R.

OMB disapproved a third provision of the final HCS that would have exempted FDA regulated drugs to the extent that they are in "solid, final form for direct administration to patients." 29 C.F.R. §§ 1910.1200(b)(6)(viii)(1988). The OSHA exemption did not exclude drug capsules containing liquids or particles. The narrow scope of the exemption resulted in drug wholesalers initially having to distribute 4.8 million MSDSs despite the fact that a professional package insert of comprehensive hazard information is already included in "every single package of a prescription drug in this country." [16]

B. The Petition Should be Granted To Resolve the Conflict Between the Third and D.C. Circuits and to Reestablish the Director's Intended Role in Regulating the Paperwork Burden Imposed by Administrative Agencies.

The Third Circuit erred in ruling that the HCS requirement to collect and distribute MSDSs does not come within the reach of the PRA and that, because the recordkeeping requirement had a regulatory purpose under the OSH Act, it was exempt from PRA review. These two rulings misinterpret the law and undermine the important powers given to OMB. The Court should take this case so that OMB can fulfill its congressional man-

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§ 1910.1200(b)(6)(vii)) lacks practical utility. Under the OSHA exemption employers could not discern when the exemption would apply. Witnesses before OMB testified that this flaw would lead to exaggerated overcompliance causing a substantial paperwork burden involving the maintenance of MSDSs. Moreover, hazard information on consumer products was duplicative of that required by the Consumer Product Safety Commission. Transcript of OMB hearings on the *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communications Standard*, Oct. 16, 1987, at 90, 148-52.

[16] Testimony before OMB of the National Wholesale Druggists Association. *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communication Standard, supra* note 15, at 168-79

date to limit paperwork requirements imposed on members of NAM without significant public benefit.

The D.C. Circuit has interpreted the PRA's predecessor, the Federal Reports Act of 1942 (codified at 44 U.S.C. § 3501-3520 (1976)), to apply to the collection of all information required by a federal agency for any regulatory purpose, whether or not the information is furnished directly to the agency. *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). The D.C. Circuit Court rejected arguments that the Federal Reports Act applied only to documents furnished to an agency. Interpreting the PRA, the court wrote that "under the Paperwork Act . . . OMB holds the same substantive power as it did under the [Federal] Reports Act. Where it determines that collection of information is unnecessary, the Agency may not proceed with the collection." *Id.* at 1453. The Court continued "[a]ppellants cannot seriously believe . . . Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; it is the record-keeping and data-gathering that constitute the burden." *Id.*

The attempt by the Third Circuit to distinguish *Action Alliance* and thus avoid the conflict is unsuccessful. The D.C. Circuit quoted the paperwork requirement that OMB lawfully disapproved: a "'written self-evaluation of [the federal fund recipients'] compliance under the [Age Discrimination] Act' . . . [and a] self evaluation available on request to the agency *and to the public.*" *Id.* at 1452 (emphasis added, citations omitted). This requirement is little different from the HCS requirement that the MSDSs be made available to employees and "upon request, to . . . the Assistant Secretary [of Labor] . . . ." 29 C.F.R. § 1910.1200(g)(11) (1988).

The Third Circuit's decision is also inconsistent with the PRA's legislative history [17] and, without so much as

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[17] The Senate Report includes within the coverage of the PRA information collected for purposes of disclosure to the public. The

a mention, rejects the OMB interpretation of the PRA. OMB's regulations, which were promulgated on March 31, 1983, define the "collection of information" as:

> the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, *or publicly disclose information.*

5 C.F.R. § 1320.7(c) (1988) (emphasis added). Subsection (2) of Section 1320.7(c) further provides, in part, that:

> *Requirements* by an agency, a person *to obtain or to compile information for purpose of disclosure to members of the public* at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.

(Emphasis added). Thus, the Third Circuit, without explanation, rejected a "permissible construction" of the

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Senate Report addreses public disclosures required by the Securities and Exchange Commission stating, "In this connection, federally mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purpose of the Federal Securities Laws." S. Rep. No. 96-930, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6279. This view was reiterated by Sen. Chiles, the Sponsor when Congress considered amendments to the PRA in 1984. He explained:

> [t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43.

statute by the administering agency, contrary to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

The Third Circuit also mistakenly and substantially narrowed the scope of the PRA by ruling that 44 U.S.C. § 3518(e) (1982) prevents OMB from performing its statutory function with respect to paperwork requirements when the rulemaking "embodies substantive policy decision-making entrusted to the other [non-OMB] agency." *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988). This determination also conflicts with the D.C. Circuit. *Action Alliance*, 846 F.2d at 1454-55. While there may on occasion be tension between OMB duties with respect to paperwork requirements under the PRA and another agency's duties under another law, the Third Circuit's meat ax approach—OMB always looses—"carve[s] so large a slice from OMB authority" that it calls for review and adjustment by the Supreme Court. *Action Alliance*, 846 F.2d at 1455.

The plain language of the PRA shows that Congress vested sole authority in OMB to determine whether a proposed paperwork requirement imposed by a federal agency is necessary or useful in achieving a substantive policy. Under the goal of ensuring that rules of federal agencies minimize the information burden on the public, Congress ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request . . . ." 44 U.S.C. § 3507(a) (1982). Congress then directed that the function of the Director to clear information collection requests shall include a determination of whether a collection of information request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility . . . ." 44 U.S.C. § 3504(c)(2) (1982). There is nothing in the PRA that terminates this authority merely because the agency or anyone else claims that the information collection request also has a

direct regulatory function. *Action Alliance*, 846 F.2d at 1455.[18]

OMB acted on a well-developed record and after detailed consultation with OSHA. OMB carefully focused its activities *only* on requirements for the collection of information and restricted its disapproval to such requirements, leaving intact the underlying regulatory approach of OSHA. The disapproved provisions involve the collection and maintenance for purposes of public disclosure and recordkeeping of hundreds, thousands, and in some cases millions of pages of material safety data sheets,[19] precisely the area of concern at which the PRA is aimed. The Court should grant the petitions to assure OMB's ability to control such excessive and costly paperwork requirements affecting NAM and all members of the public.

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[18] The Third Circuit paid little attention to relevant legislative history when it construed § 3518(e) to deny the Director of OMB the authority to review agency rules. Prior to and during consideration of the PRA, Congress understood the Executive already to have the authority to intervene on substantive points of other agency rulemakings. *See* Pub. L. No. 94-78, § 4 (August 9, 1975) amending The Council on Wage and Price Stability Act, Pub. L. No. 93-387 (August 24, 1974).

[19] *See* OMB Docket 1218-0072 including written submissions accompanying April 2, 1987 and October 16, 1987 transcript of public hearings. For example the Small Business Administration estimated that a typical plumber must maintain 500 MSDSs compared with OSHA's estimate of 12. Ex. 2-21 (October 16, 1987). One contractor from Minnesota estimated that 55 file cabinets to maintain MSDSs may be required at a typical construction high rise site. Oct. 16, 1987, Transcript at 109.

CONCLUSION

For these reasons, and upon the entire record, the petitions for writs of certiorari should be granted in both *Associated Builders and Contractors, Inc. v. Brock* and *United Steelworkers of Am. v. Pendergrass* (USWA III).

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